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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Filed May 27, 1963

Civil Action No. 4771-Civ-J

ATLANTIC COAST LINE R. CO., ILLINOIS CENTRAL R. CO., CHICAGO & EASTERN ILLINOIS R. CO., THE BALTIMORE & OHIO R. CO., CHICAGO, BURLINGTON & QUINCY R. CO., CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC R. CO., GULF, MOBILE & OHIO R. CO., THE NEW YORK CENTRAL R. CO., WABASH RAILROAD CO., PLAINTIFFS,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, DEFENDANTS

AGREED STATEMENT OF THE CASE ON APPEAL, PURSUANT TO RULE 76.

The Interstate Commerce Commission, appellant, and the Atlantic Coast Line Railroad Company, et al., appellees, hereby stipulate and agree for the purpose of this appeal solely on the jurisdictional questions by the Interstate Commerce Commission to the United States Court of Appeals for the Fifth Circuit, as follows:

1. On May 20, 1946, Thomson Phosphate Company, hereinafter Thomson or the shipper, filed with the Com-

mission an informal complaint No. 174417 alleging that certain rates on unspecified shipments "during the past two years," as supplemented on December 4, 1947, to add "during the pendency of this proceeding," of ground phosphate rock from Prairie, Florida, to destinations in the State of Illinois were unreasonable, and requested reparation or reimbursement of the transportation charges to the extent they were unlawful. After correspondence and other informal proceedings, the railroads made a reparation payment of $13,071.98 in November 1950, pursuant to Commission order of September 19, 1950, in Special Docket 218792. Thereafter Thomson filed a formal complaint with the Commission on October 14, 1952, in Docket No. 31124, which resulted in an award of reparation to the shipper. *Thomson Phosphate Co.* v. *Atlantic Coast Line R. Co.*, 291 I.C.C. 1 (1953), 293 I.C.C. 369 (1954). This further award of $1,463.80 was paid to Thomson by the appellees on October 5, 1955, by check reading "payment in full of all matters in Informal Complaint 174417."

2. After an additional exchange of correspondence, in which the Railroads contended that the matter was closed and the claims were barred by § 16(3) of the Interstate Commerce Act and I.C.C. Rule 25, and other details, Thomson filed a further formal complaint on October 16, 1956, in Docket No. 32065, alleging that the rates on about 636 shipments of ground phosphate rock from Prairie, Florida, to over 100 destinations in Illinois in the period April 10, 1945, to December 31, 1950, were unjust and unreasonable, and requested reparation. After various proceedings, the Commission issued a report finding that the assailed rates were unjust and unreasonable and that the shipper was entitled to reparation. *Thomas Phosphate Co.* v. *Atlantic Coast Line R. Co.*, 303 I.C.C. 25 (1958). Upon request of Thomson, when appellees refused to certify the shipper's statements showing the shipments made in the past period, the Commission reopened the proceeding for a determination of the amount of reparation due. After additional proceedings,

the Commission issued a report on September 28, 1960, 311 I.C.C. 315, finding that the shipper was entitled to reparation of $8,889.76 with interest, and entered an order authorizing and directing appellees to pay such sum on or before December 1, 1960. One Commissioner dissented, holding that the claims were barred. The latter order, having been stayed pending reconsideration, was modified by the Commission in an order of July 13, 1961, so as to require compliance on or before August 28, 1961, without otherwise changing the requirements of the earlier order.

3. Appellees filed their complaint in the District Court on September 6, 1961. The Commission's reports and orders were not stayed pending the appeal. Appellees have not paid to Thomson the reparation of $8,889.76 and interest awarded by the Commission. Thomson did not intervene or enter any appearance in the court below, although its counsel had notice of the proceeding and was entitled to participate.

4. The appellant Commission filed a motion to dismiss the complaint on the grounds that the Commission had not issued a final order which was appealable to court, and that the Court lacked jurisdiction or the Court should dismiss in the exercise of a sound equitable discretion. On May 15, 1962, after briefs and oral argument, the District Court entered an order denying the motion to dismiss the complaint. These same issues are the basis of this appeal to the Court of Appeals.

5. On August 22, 1962, Thomson, a corporation which was legally dissolved in *1951*, filed suit against appellees and other railroads pursuant to section 16(2) of the Interstate Commerce Act, 49 U.S.C. § 16(2), in the United States District Court for the Southern District of New York for the sum of $8,889.76, together with interest thereon, costs, and an attorney's fee. These papers were served on the Railroads on August 28, 1962. It has been stipulated to hold the New York case in abeyance pending the outcome of the Florida case.

6. Following briefing and oral argument on November 19, 1962, the District Court at Jacksonville (M.D. Fla.) on January 9, 1963, entered judgment for appellees, with findings of facts and conclusions of law reaffirming that the Court had jurisdiction to review the reports and orders of the Commission herein, and deciding that the same are unlawful and should be set aside because the claims were barred by the statute of limitations and for other reasons, 213 F. Supp. 199.

7. On March 11, 1963, appellant filed its notice of appeal in the District Court, and on April 17, 1963, the Clerk of the Court of Appeals received from the Clerk of the District Court the certified original papers comprising the record on appeal.

8. Appellant does not appeal the findings of the District Court on the merits but only appeals the question of jurisdiction. The points to be relied on by the appellant (and opposed by appellees) are:

a. The District Court is without jurisdiction to entertain the complaint of the appellee railroads to review the Commission's decision, since the Commission has not issued a final and binding order against these appellees.

b. The District Court is without jurisdiction to entertain the complaint, since the exclusive method for enforcement and review of the decision is provided in a suit by the shipper under section 16(2) of the Interstate Commerce Act, 49 U.S.C. § 16(2).

c. The District Court abused its equity discretion, if any exists to entertain the complaint, since appellees have a plain and adequate remedy at law.

d. The District Court abused its equity discretion, if any exists to entertain the complaint, in depriving the shipper of the choice of venue granted by the statute.

9. There is attached hereto, and made a part hereof, the following items which shall with this agreed statement constitute the record designated for printing:

a. Report of the Commission decided February 10, 1958, 303 I.C.C. 25.

b. Report of the Commission decided September 28, 1960, except the appendices thereto, 311 I.C.C. 315.

c. Orders of the Commission dated September 28, 1960, and July 13, 1961.

d. Appellees' complaint filed in the District Court on September 6, 1961, except appendices which were the reports and orders (a, b, and c) above.

e. Order of the District Court entered May 15, 1962.

f. Judgment, Findings of Fact, and Conclusions of Law entered by the District Court on January 9, 1963.

g. Appellant's Notice of Appeal, filed in the District Court on May 11, 1963.

h. Thomson's complaint in the United States District Court for the Southern District of New York and attached letter, a copy of which was filed for the information of the Court below and the parties at the hearing held November 19, 1962, by counsel for appellant, except exhibits thereto.

10. The parties on brief or in argument may refer to other portions of the record as to them it may appear appropriate.

Dated this the 22nd day of May, 1963.

/s/ Leonard S. Goodman
Counsel for Appellant

/s/ U. B. Ellis
Counsel for Appellees

Pursuant to Rule 76 of the Federal Rules of Civil Procedure, the foregoing Agreed Statement of the Case on Appeal is hereby approved and is certified as a supplemental record on appeal.

This the 28 day of May, 1963.

/s/ Wm. A. McRae, Jr.
United States District Judge

INTERSTATE COMMERCE COMMISSION

No. 32065

THOMSON PHOSPHATE COMPANY

v.

ATLANTIC COAST LINE RAILROAD COMPANY ET AL.

Decided February 10, 1958

* * * *

BY DIVISION 2:

The modified procedure was followed, and oral hearing was held for cross-examination of the complainant's witnesses. Exceptions to the report proposed by the examiner and replies thereto were filed by the parties. The conclusions herein differ from those recommended by the examiner. Exceptions and requested findings not specifically discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

By complaint filed on October 16, 1956, complainant, a corporation, alleges that the rates charged on numerous shipments of ground phosphate rock, in carloads, from Prairie, Fla., to destinations in Illinois from April 10, 1945, to December 31, 1950, were unjust and unreasonable. Reparation only is sought. During the period involved the complainant was an Illinois corporation dealing in ground phosphate rock used in agriculture, with its principal office in Chicago, Ill. The corporation was dissolved in September 1951, but use of its name as a complainant in this proceeding was permissible under Illinois statutes.

The defendants contend that no reparation can be awarded in this proceeding because all of these shipments moved more than 5 years before this complaint was filed. Section 16(3)(b) of the Interstate Commerce Act requires that complaints against carriers subject to part I of the act for the recovery of damages not based on overcharges must be filed within 2 years from the time the cause of action accrues, and not after. The disposition of this contention depends upon the effect to be given to an informal complaint No. 174417, filed with the Commission by this complainant on May 20, 1946, alleging that rates on ground phosphate rock from Prairie "to all stations in the State of Illinois during the past 2 years" were unreasonable. This complaint was transmitted to the Atlantic Coast Line Railroad Company, hereinafter called the Atlantic Coast Line, the originating carrier.

In a letter dated December 4, 1947, the complainant advised the Commission that its informal complaint "is for reparation on all shipments described herein to all destinations in Illinois during the statutory period, as well as the pendency of this proceeding." A copy of this letter was sent to the Atlantic Coast Line. That carrier wrote the Commission on December 17, 1947, stating that it was willing to consider—

> the question of payment of reparation on all the shipments involved in this informal complaint upon which the statute of limitations has not run, with a view of making reparation by observance of the basis fixed by the Interstate Commerce Commission for reparation purposes in the Diamond Fertilizer Company case * * *. [*Diamond Fertilizer Co.* v. *Aberdeen & R. R. Co.*, 256 I. C. C. 75]

Rates were prescribed therein for application on phosphate rock from Florida points, including Prairie, on the bases of 85 percent of the fertilizer scale approved in *Fertilizer Between Official and Southern Territories*, 232 I.C.C. 301, as to past shipments, on which reparation was awarded, and 75 percent thereof for the future. Among the destinations involved in *Diamond Fertilizer Co.* v. *Aberdeen & R. R. Co.*, 256 I. C. C. 75, were East St. Louis, Ill., and Indianapolis and Hartsdale, Ind.

Subsequently a special-docket application No. 218792, was filed by the defendants, and, upon consideration thereof, an order was entered on September 19, 1950, directing payment of $13,012.52 to the complainant as reparation on account of unreasonable charges on shipments moved during the period from November 15, 1943, to April 7, 1945. In its letter of December 7, 1950, to the Atlantic Coast Line, acknowledging payment of this reparation, the complainant called attention to the fact that its informal complaint also embraced shipments which had moved after April 7, 1945, and requested reparation thereon. The question whether the complainant was entitled to reparation of these later shipments was the subject of further correspondence between the parties and our secretary, who wrote to the complainant on June 26, 1952, that no further action in the premises would be taken informally, and that if it desired to pursue the matter further, a formal complaint would be necessary.

The complainant filed such complaint No. 31124 on October 14, 1952, assailing rates on ground phosphate rock from Prairie to Bethany, Malta, Paris, Rossville, and Wapella, Ill., which resulted in decisions by division 3, *Thomson Phosphate Co.* v. *Atlantic Coast Line R. Co.*, 291 I. C. C. 1 and 293 I. C. C. 369, awarding reparation. In reply to the complainant's request that the informal complaint be held in abeyance pending a decision in No. 31124, the Commission's secretary stated in his reply of December 24, 1952, that "in accordance with your request, the informal proceeding will be considered reopened." The defendants there contended, as they do herein, that the informal complaint No. 174417, was completely disposed of by the order in special docket No. 218792 on September 19, 1950, and that the filing of the formal complaint in No. 31124 more than 2 years later was too late. Division 3, however, concluded that the filing was timely, pointing out that as to shipments after April 7, 1945, "the informal proceeding was closed on June 26, 1952, without adjustment."

The reparation awarded in No. 31124 was paid on October 5, 1955, by a check enclosed in a letter from the Atlantic Coast Line to the complainant's counsel, stating that it represented "payment in full of all matters involved in Informal Complaint 174417 and I. C. C. Docket No. 31124 growing out of that informal complaint." In acknowledging payment on October 14, 1955, the complainant again referred to the reopening of the informal complaint on December 24, 1957, and requested "adjustment on the shipments to the remaining Illinois destinations through special docket channels * * *." Further fruitless correspondence followed, in the course of which the Atlantic Coast Line asserted that the informal complaint had been terminated by the Commission's letter of June 26, 1952.

Some time later, in a letter dated March 29, 1956, the secretary of the Commission again wrote to the complainant's counsel that the matter involved in the informal complaint "is one not susceptible of adjustment on the Commission's informal docket." However, upon receipt of a letter from the complainant's counsel requesting reconsideration the chief of our section of informal cases wrote to the Atlantic Coast Line on April 4, 1956, stating that the informal docket "is hereby reopened and submitted to you for your further consideration." After additional exchange of correspondence the secretary of the Commission wrote to the complainant's counsel on April 19, 1956, stating that "we are again declining the complaint."

Rule 1.25(f) of our General Rules of Practice provides, among other things, that when an informal complaint seeking damages cannot be disposed of informally the parties will be so notified in writing, and the matter in such complaint will not be reconsidered, unless, within 6 months of such notice, a formal complaint as to such matter is filed or it is informally resubmitted on an additional fact basis. The filing of the instant complaint on October 16, 1956, was seemingly in conformance with the

"six months' rule" if the secretary's letter of April 19, 1956, is regarded as the final declination of the informal complaint. The defendants urge that the informal complaint should be regarded as having been closed either by the secretary's letter of June 26, 1952, or that of March 29, 1956, and that no additional facts were later presented by the complainant after either of those dates to support the purported reopenings of December 24, 1952, or April 4, 1956.

In support of this argument the defendants rely on the decision of division 2 in *LeTourneau-Westinghouse Co.* v. *Southern Ry. Co.*, 299 I. C. C. 17, which dealt with a factual situation somewhat resembling that now before us. On reconsideration, however, 299 I. C. C. 780, the Commission reversed the finding of the division that the complaint was barred. The Commission said, at pages 780 and 781:

> The division concluded that by repeated notices the complainant was fully apprised that the matter was not susceptible of informal adjustment, and that it should have filed the formal complaint within 6 months of the first notice, whereas it failed to file such a complaint within 6 months of the final notice on February 18, 1954. The division further recognized an exchange of correspondence between the parties in May 1955, and a subsequent notice from our secretary, dated July 21, 1955, that the complaint was declined, but decided that the complainant had been on definite notice prior thereto.
>
> We are in complete agreement with the division's observation that the complainant had definite notice that the matter was not susceptible of informal adjustment before the secretary's letter of July 21, 1955. However, we deem important the statements in the letter that the contents of the complainant's latest letters had been given consideration, that the complaint was again declined, and that the complainant's attention was directed to rule 25 (f) of the General Rules of Practice. Thus, the letter implied that the complainant still had 6 months within which to file a formal complaint. In these circumstances, we are of the view that the matter is not barred, and we shall proceed to a consideration of the merits.

The secretary's letter of April 19, 1956, in the instant proceeding was drawn along similar lines. It indicated that the matter was one not susceptible of informal adjustment, and directed the complainant's attention to the appropriate provisions of rule 1.25 (f) of the General Rules of Practice. We consider this letter to have been the final declination and its date to have marked the beginning of the 6 months' period. Accordingly, the complaint is not barred.

The defendants urge also that the complainant is not a proper party to receive a possible award of reparation in this proceeding on two grounds:

(1) The complainant bought the rock which comprised these shipments from the International Minerals and Chemical Corporation, hereinafter referred to as International, which prepaid the freight charges but debited them specifically in the complainant's account. The complainant's prices to the consignees, its customers, who were chiefly farmers, were on a delivered basis. Freight costs among other elements were considered in quoting those prices. Although the freight charges were initially paid by International, they were paid and borne by the complainant within the usual meaning of that term.

(2) In April 1951 International acquired all of the outstanding capital stock of the complainant, which was dissolved in September of that year. As a result of these transactions most of the complainant's assets were taken over by International, but it appears that the claim which is the subject of this complaint was excepted from the transfer, contrary to the assertion of the defendants. This conclusion is substantiated by the fact that the reparation awarded in No. 31124 based on shipments which moved on and between July 5, 1945, and January 11, 1949, was paid to the complainant in October 1955 without objection on the part of International.

Another contention of the defendants is that the filing of this complaint more than 5 years after the complainant was dissolved was in contravention of an Illinois statute reading, in part, as follows:

The dissolution of a corporation * * * shall not take away or impair any remedy available to or against such corporation, its directors, or shareholders, for any right or claim existing or any liability incurred, prior to such dissolution if action or other proceeding thereon is commenced within two years after the date of such dissolution. Any such action or proceeding by or against the corporation may be prosecuted or defended by the corporation in its corporate name.

The instant complaint may be considered as one phase of a proceeding which was commenced by the filing of informal complaint No. 174417 before the dissolution of the complainant corporation. The prosecution of the formal complaint in the name of the complainant was therefore not inconsistent with this statute. See *Chicago Title and Trust Co.* v. *Wilcox Bldg. Corp.*, 302 U. S. 120, 128.

The defendants further urge that the assailed rates have not been shown to be unjust or unreasonable in that the material facts, including the nature of the movements, consignees, destinations, loading, frequency, and the actual commodity and its utilization, are much different from those involved in the decisions cited by complainant as precedents.

The shipments consisted of 636 carloads, which moved to more than 100 destinations throughout Illinois, of which Harrisburg, Carlinville, Champaign, Kankakee, and Rochelle are geographically representative. The average carloading was about 84,000 pounds, substantially the same as that in *Diamond Fertilizer Co.* v. *Aberdeen & R. R. Co., supra.* There, and in *Armour & Co.* v. *Aberdeen & R. R. Co.*, 268 I. C. C. 502, the shipments were to chemical companies at a limited number of points, which manufactured superphosphate or heavy chemicals. Nevertheless in No. 31124 division 3 was guided by those decisions in considering the rates on shipments of ground phosphate rock to farmers at widely scattered points. Its decision included the following:

On average loads for distances of from 1,251 to 1,046 miles, the car-mile yields range from 23.9 to 26.3 cents

from the applicable rates, and would range from 22.6 to 24 cents from the rates sought.

Here it is shown that on average loads to representative points for distances between 1,018 and 1,164 miles, the car-mile earnings ranged from 23.6 to 26.9 cents under the rates in effect on June 30, 1946, compared with a range from 22.9 to 24.2 cents under the basis sought. The circumstances considered by division 3 in reaching its decisions in No. 31124 are indistinguishable from those shown by this record.

We find that the rates assailed were unjust and unreasonable to the extent that they exceeded 75 percent of the rates on fertilizer materials on the basis approved in *Fertilizer Between Official and Southern Territories*, *supra*, extended to include distances from Bartow, Fla., and increased as subsequently authorized for application on phosphate rock when the shipments moved.

We further find that the complainant made the shipments as described and paid and bore the charges thereon at rates herein found to have been unjust and unreasonable, and was damaged thereby in the amount of the difference between the charges paid and those which would have accrued at the rates herein found to have been just and reasonable, and is entitled to reparation, with interest. The complainant should comply with rule 1.100 of the General Rules of Practice.

REPORT OF THE COMMISSION

Decided September 28, 1960

(Title Omitted)

BY DIVISION 3:

Exceptions to the report and order on further hearing recommended by the examiner were filed by the defendants, and the complainant replied. At the request of the defendants, the parties were heard in oral argument following the hearing before the examiner, in lieu of filing briefs. Exceptions and requested findings not specifically discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

In the prior report, 303 I.C.C. 25, decided February 10, 1958, under the modified procedure, in which oral hearing was held for cross-examination of the complainant's witnesses, division 2 found that the rates [1] charged on numerous shipments of ground phosphate rock, in carloads, moved on and between April 11, 1945, and October 21, 1950, from Prairie, Fla., to destinations in Illinois, were unjust and unreasonable to the extent that they exceeded 75 percent of the rates on fertilizer materials on the basis approved in *Fertilizer Between Official and Southern Territories*, 232 I.C.C. 301, extended to include distances from Bartow, Fla., and increased as subsequently authorized for application on phosphate rock when the shipments moved. Accordingly, the complainant was found to be entitled to reparation, with interest, on these shipments, in the amount of the difference between the charges paid and those found to have been just and reasonable, and was directed to comply with rule 1.100 of the General Rules of Practice. A petition by the defendants for reconsideration of the findings in the prior report, to which reply was made by the complainant, was denied by the Commission on July 23, 1958.

[1] Rates are stated per ton of 2,240 pounds.

In due course, statements were filed with the defendants by the complainant containing details of the shipments on which reparation is claimed, in compliance with the requirements of rule 1.100. Thereafter, the defendants declined to certify any of the statements, and returned them to the complainant. Upon request of the complainant, the proceeding was reopened for further hearing, solely for the purpose of determining the amount of reparation due under the findings in the prior report.

After a hearing, a recommended report and order were issued, wherein the examiner found that the complainant was entitled to reparation in the total amount of $8,-889.76, with interest, on the shipments of record, listed in appendix A to this report. The defendants were allowed 30 days, however, after service of the examiner's report, in which to make a check as to the accuracy of the amounts of reparation therein specified. Subsequently, a petition for leave to file petition for reconsideration of the findings in the prior report, filed by the defendants, was denied by the Commission on June 23, 1960. Thus, the issue herein is limited solely to a determination of the amount of reparation due the complainant under the findings in the prior report.

The defendants, aside from excepting to the amount of reparation recommended by the examiner, also protest the finding in the prior report and the examiner's recommendation on further hearing that interest be allowed in connection therewith. It is their view that interest is awarded only as a means of compensating complainants for the period of time in which they have been "deprived of the use of their money" and that the complainant here has been deprived thereof, if at all, only because of its own delay in formally processing its reparation claims. In essence, the defendants accuse the complainant of being guilty of laches. The Commission's denial of the defendants' petition for reconsideration of the prior report precludes our further consideration of that matter in this proceeding.

Specifically, the defendants contend that the examiner erred in finding the complainant entitled to reparation in the total amount of $8,889.76, plus interest, and urge that if reparation is to be awarded herein, it should not exceed $8,258.75, without interest. In support thereof, they offer certain alleged corrections in the amounts of reparation to be awarded on some 35 shipments, which would result in a reduction of $125.02 in the total amount of reparation indicated in appendix A to the examiner's recommended report on further hearing. For example, on a shipment of 112,800 pounds of ground phosphate rock shipped to Andres, Ill., in car number NYC 101560 on April 13, 1945, charges of $370.13 were collected based on a rate of 735 cents. In appendix A to his report, the examiner determined that charges of $360.56 should have been assessed, based on a rate of 716 cents, and that reparation should be awarded in the amount of the difference, or $9.57. In their exceptions, the defendants contend that the proper rate under the "75-percent" scale was 725 cents, which would result in charges on this shipment of $365.09, with resulting reparation in the amount of $5.04. The evidence of record indicates that the "75-percent" scale projected to 1,175 miles, the distance to Andres, produced a rate of 716 cents at the time of movement. No justification appears for this and like changes suggested by the defendants. In these circumstances, the defendants' proposed corrections must be rejected.

It is further contended by the defendants on exceptions that the examiner erred in not rejecting reparation claims with respect to 57 shipments, listed in appendix B hereto, which would have effected a further reduction of $505.99 in the total amount of reparation. It appears that these particular shipments had been diverted to destinations other than those originally specified, and that the complainant was unaware of that fact. The defendants urge that this establishes that the complaint had neither paid nor borne the freight charges on these shipments, and is not entitled to reparation thereon. As previously stated,

the issue before us is the determination of the total amount of reparation to be awarded. Division 2 found, in the prior report, that the complainant paid and bore the charges on all the shipments herein, and no reason appears for questioning that finding. Accordingly, the defendants' contention that the examiner erred in recommending reparation on these shipments has no support of record. As pointed out by the complainant, the distances to the actual destinations of these shipments instanced by the defendants are shorter than those to the original destinations designated. Thus, the reparation award recommended, as to these shipments, is at least no less than that warranted by the actual distances.

Upon further hearing, we find that the complainant is entitled to reparation from the defendants in the accompanying order in the amounts set opposite their respective names in appendix C hereto, aggregating $8,889.76, with interest. An appropriate order will be entered.

COMMISSIONER WALRATH, dissenting:

While I agree with the findings of the majority with respect to the limited issues on further hearing, I believe that the complaint is barred by section 16(3) of the act.

ORDER ENTERED SEPTEMBER 28, 1960

(Title Omitted)

This proceeding having been further heard, and full investigation of the matters and things involved having been made, and said division having, on the date hereof, made and filed a report on further hearing containing its findings of fact and conclusions thereon, which report, together with the prior report, 303 I.C.C. 25, is hereby referred to and made a part hereof:

It is ordered, That the defendants named in appendix A to the report on further hearing made a part hereof, according as they participated in the transportation, as shown in appendix C to said report, be, and they are hereby, authorized and directed to pay unto the complainant, Thomson Phosphate Company, on or before December 1, 1960, the sum of $8,889.76 with interest thereon at the rate of 4 percent per annum from the dates the unjust and unreasonable charges were collected, as reparation on account of unjust and unreasonable rates charged for the transportation of 639 carloads of ground phosphate rock from Prairie, Fla., to numerous destinations in Illinois, on and between April 11, 1945 and October 21, 1950, all as described in the aforesaid reports.

By the Commission, division 3.

HAROLD D. MCCOY,
Secretary

(SEAL)

ORDER ENTERED JULY 13, 1961

(Title Omitted)

Upon consideration of the record in the above-entitled proceeding, and the order of the Commission, Division 3, dated September 28, 1960, which was stayed pending disposition of the petition for oral argument and reconsideration, which petition was denied by order of the Commission, dated May 23, 1961;

It is ordered, That the said order of Division 3, dated September 28, 1960, be vacated only insofar as it required compliance on or before December 1, 1960, and that said order be modified so as to require compliance on or before August 28, 1961, without otherwise changing the requirements of said order.

By the Commission.

HAROLD D. MCCOY,
Secretary

(SEAL)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
(Jacksonville Division)

Civil Action No. 4771 Civ-J

ATLANTIC COAST LINE R. CO., ILLINOIS CENTRAL R. CO., CHICAGO & EASTERN ILLINOIS R. CO., THE BALTIMORE & OHIO R. CO., CHICAGO, BURLINGTON & QUINCY R. CO., CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC R. CO., GULF, MOBILE & OHIO R. CO., THE NEW YORK CENTRAL R. CO., WABASH RAILROAD CO.

vs.

UNITED STATES OF AMERICA, AND INTERSTATE COMMERCE COMMISSION

COMPLAINT TO ENJOIN, SET ASIDE, AND ANNUL ORDERS OF THE INTERSTATE COMMERCE COMMISSION

I.

Plaintiffs, as set forth above, bring this action against the Interstate Commerce Commission and the United States of America to enjoin, set aside, and annul certain orders dated September 28, 1960, and July 13, 1961, copies attached as Appendix A and B, made by the Interstate Commerce Commission (hereinafter referred to as the Commission) in a proceeding known as Thomson Phosphate Company v. Atlantic Coast Line Railroad Company, et al, Docket 32065, in which printed reports appear at 303 ICC 25 and 311 ICC 315 (copies attached as Appendix C and D). Plaintiffs here were the defendants before the Interstate Commerce Commission.

II

Plaintiffs have exhausted their remedies before the Commission and several petitions for reconsideration have been denied by orders of July 23, 1958, and May 23, 1961.

III

This action arises under, the United States is made a defendant herein, and the jurisdiction of this court rests on, 28 USCA Sections 1336, 1398 and § 17(9) of the Interstate Commerce Act, 49 USCA § 17(9).

IV

This action is properly reviewable by a one-judge District Court instead of a three-judge Court because it involves an order for the payment of money. *Pennsylvania R. Co.* v. *United States*, 363 U.S. 202, 205.

V

Venue exists under 28 USCA § 1398 because Plaintiff, Atlantic Coast Line R. Co., is a corporation under the laws of Virginia, having its principal office at Jacksonville, Fla.

The other Plaintiffs are each corporations having their principal offices in Chicago, Illinois, Baltimore, Md., New York, N.Y., Mobile, Ala., and St. Louis, Mo.

All shipments involved in this proceeding originated on the Atlantic Coast Line R. Co. at Prairie, Fla., and the other Plaintiffs were respectively the delivering carriers on only some of the shipments, as shown in the printed report at 311 ICC 315.

VI

This proceeding involves freight charges on about 636 shipments of ground phosphate rock from Prairie, Fla., to various (over 100) points in Illinois between April 10, 1945, and December 31, 1950.

Complainant before the ICC contended the rates were unreasonable to the extent they exceeded 75 per cent of certain fertilizer rates.

The Railroads contended that the assessed rates were not unreasonable, and further contended:

a) That complainant was barred by the 2 year statute of limitations in § 16(3) of the Interstate Commerce Act, 49 USCA § 16(3) because the shipments all moved prior to December 31, 1950 and the complaint was not filed until October 16, 1956;

b) That complainant and the Commission had failed to observe the requirements of Commission Rule of Practice 25(f) and thus failed to stay the Statute of Limitations;

c) That the informal complaint which the complainant and the Commission relied upon to stay the Statute of Limitations, § 16(3)(b), did not satisfy the Commission Rule of Practice 25(b) in that it did not include the proper details regarding shipments:

d) That the formal complaint filed October 16, 1956, does not satisfy Commission Rule of Practice 29 and thus did not stay the Statute of Limitations;

e) Likewise that it did not satisfy Rule 17(b) regarding signing and verification by an Executive officer;

f) The Railroads submitted that complainant had sold its interest in all claims on shipments moved prior to January 1, 1948, and thus had no right to claim reparations;

g) That complainant did not pay or bear the freight charges and thus was not entitled to recover in any event;

h) That complainant corporation was dissolved in September, 1951, and could not therefore file an action or formal proceeding before the Interstate Commerce Commission in October, 1956;

i) That it was error to award reparations at all, and further error to award interest for all this period of time where a complainant sat back for over 10 years as to some shipments before taking formal action.

VII

The matter was handled by the Commission under Modified Procedure (by affidavits) in 1957. Then hearing for cross-examination of complainant's witnesses took place May 29, 1957.

Thereafter the Examiner of the Interstate Commerce Commission issued his report in August, 1957, finding the claims barred by the Statute of Limitations.

Then on February 10, 1958, a Division of the Commission issued a report (303 ICC 25) ruling against the RailRoads on all points discussed and disregarding others completely. A petition for reconsideration was filed by the railroads and was denied by Commission order of July 23, 1958.

The railroads refused to certify the amount of reparations due and the matter was referred to an Examiner for a further hearing which took place April 27, 1959. After further procedure, a second report of a Division of the Commission issued September 28, 1960 (311 ICC 315) which was adverse to the railroads, but one of the three Commissioners dissented saying the claims were barred by § 16(3). A petition for reconsideration was filed, and denied by order of May 23, 1961.

Oral argument was requested in three separate pleadings, and was always denied.

VIII

The Commission erred in finding the rates assessed unreasonable and in awarding reparations.

IX

The Commission erred in awarding interest.

X

The Commission erred in not finding the claims barred by § 16(3)(b) of the Act.

XI

The Commission erred in not properly applying its Rules of Practice, 17, 25 and 29, the result of which has the substantive effect of improperly staying the statute of limitations, which statute has been judicially construed to destroy the right as well as the remedy.

The Commission erred in allowing prosecution of a complaint or action for damages by a corporation which had sold its alleged claims to another corporation and dissolved itself five years previously.

XIII

The reports and orders of the Commission to the extent that they find the rates assessed unreasonable, award reparations, award interest, fail to find the complainant barred by the 2 year statute of limitations in § 16(3) (b) of the Interstate Commerce Act, 49 USCA § 16(3) (b), and fail to properly apply Commission Rules of Practice 17, 25, and 29 to the proceeding before the Commission,— are unlawful and void and beyond the power of the Commission to make for the following reasons:

a) In making said reports and orders the Commission failed to consider material evidence of record.

b) The Commission misapplied the law.

c) The conclusion that the rates were unjust and unreasonable is not predicated upon any evidence or finding that rates were unjust and unreasonable in and of themselves with regard to the transportation service rendered.

d) The reports and orders are otherwise arbitrary, capricious and without support in, and contrary to the law and the evidence.

XIV

By reason of the arbitrary and capricious action and the errors of law of the Commission in entering its reports and orders in its Docket 32065, plaintiffs are left without an adequate remedy at law and will be subject to irreparable damage if the relief herein prayed for is not granted.

WHEREFORE, plaintiffs pray that:

1) At final hearing and submission of this case, the court adjudge and determine that the reports and orders

of the Interstate Commerce Commission, appendices A, B, C, and D are unlawful, arbitrary, and capricious, without support in and contrary to the law and evidence;

2) That a decree be entered appropriately enjoining, setting aside and annulling the said reports and orders, and holding that the complaint was barred by the statute of limitations and/or that the rates assessed were not proved to be unreasonable;

3) That the matter be remanded to the Commission for further action not inconsistent with this court's decree; and

4) That plaintiffs have such further relief in the premises as the nature of the case should require and as to this court seems proper.

Respectfully submitted,

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Jacksonville 2, Florida

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DAVID E. WELLS
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Jacksonville 2, Florida

Of Counsel

DATED: August 28, 1961

[Appendices omitted]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

(Title Omitted)

ORDER

ON MAY 8, 1962, this cause came on for hearing on the motion of the Interstate Commerce Commission (ICC) to dismiss the complaint. The Court heard full argument of counsel for the respective parties, and has had the benefit of extensive briefs on the disputed questions.

It is the opinion of the Court that jurisdiction exists in this case. 28 USCA § 1336, 5 USCA § 1009, 49 USCA § 17(9), 28 USCA § 2201; Federal Rule of Civil Procedure 57.

The ICC has urged, as an alternative position to asserted lack of jurisdiction, that the Court should dismiss the complaint in the exercise of its equity discretion. If it is assumed that the motion hinges on this point, then the Court, on the showing which has been made, considers it proper to assume jurisdiction and not to dismiss the complaint.

Upon consideration, it is thereupon,

ORDERED that the motion of the Interstate Commerce Commission to dismiss the complaint be, and the same hereby is, denied.

DONE and ORDERED in Chambers at Jacksonville, Florida, this 15th day of May, 1962.

/s/ Wm. A. McRae, Jr.
Judge

JUDGMENT

(Title Omitted)

In accordance with the Findings of Fact and Conclusions of Law entered herein on January 9, 1963, it is

ORDERED, ADJUDGED AND DECREED that the reports and orders of the Interstate Commerce Commission in *Thompson Phosphate Company* v. *Atlantic Coast Line Railroad Company, et al*, No. 32065, are unlawful and are hereby set aside.

DONE AND ORDERED in Chambers at Jacksonville, Florida, this 9th day of January, 1963.

Original signed:
WM. A. MCRAE, JR.
Judge

Copies to all counsel

FINDINGS OF FACT

(Title Omitted)

1. This action, filed September 6, 1961, seeks review of a reparation order of the Interstate Commerce Commission in Docket 32065, *Thomson Phosphate Co.* v. *Atlantic Coast Line Railroad Company, et al*, 303 I.C.C. 25, 311 I.C.C. 315. The complaint before the Interstate Commerce Commission was filed on October 16, 1956. It alleged that the rates assessed on ground phosphate rock were unjust and unreasonable to the extent that they exceeded 75% of certain rates on fertilizer materials.

The shipments of phosphate rock (about 636 in number) were from Prairie, Florida, to more than 100 destinations in Illinois during the period April 1945 through December 1950, as tabulated in Appendix A, 311 I.C.C. 315, 318.

The amount involved is $8,889.76 with interest at 4% per annum from the dates the charges were collected. All of the shipments were made and the charges were paid between April 10, 1945, and December 31, 1950; the accrued interest and principal accordingly may reach $15,000.

The Railroads contended that the assessed rates were not unreasonable, and further contended:

(a) That Thomson was barred by the 2-year statute of limitations in § 16(3) of the Interstate Commerce Act, 49 U.S.C. § 16(3), because the shipments all moved prior to December 31, 1950, and the complaint was not filed until October 16, 1956;

(b) That Thomson and the Commission had failed to observe the requirements of Commission Rule of Practice 25(f) and thus failed to stay the Statute of Limitations (Rule 25 is attached hereto as an appendix);

(c) That the Informal Complaint 174417, filed March 20, 1946, which Thomson and the Commission relied upon to stay the Statute of Limitations [§ 16(3)(b)], did not

satisfy the Commission Rule of Practice 25(b) in that it did not include the proper details regarding shipments;

(d) That the Formal Complaint, filed October 16, 1956, did not satisfy Commission Rule of Practice 29 and thus did not stay the Statute of Limitations;

(e) That likewise it did not satisfy Rule 17(b) regarding signing and verification by an executive officer;

(f) That Thomson had sold its interest in all claims on shipments moved prior to January 1, 1948, and thus had no right to claim reparations;

(g) That Thomson did not pay or bear the freight charges and thus was not entitled to recover in any event;

(h) That Thomson, a corporation, was dissolved in September 1951 and, accordingly, could not therefore file an action or institute formal proceedings before the Interstate Commerce Commission in October 1956;

(i) That it was error to award reparations at all; and further that it was error to award interest for all this period of time in which a complaint sat back for over 10 years as to some shipments before taking formal action.

2. The matter was handled in 1957 by the Commission, by affidavits, under Modified Procedure. Hearing for cross examination of complainant's witnesses took place May 29, 1957.

Thereafter, the Examiner of the Interstate Commerce Commission issued his report in August 1957 and found that the claims were barred by the Statute of Limitations.

On February 10, 1958, a Division of the Commission issued a report (303 I.C.C. 25) ruling against the Railroads on all points discussed and completely disregarding others. A petition for reconsideration was filed by the Railroads and was denied by Commission order of July 23, 1958.

The Railroads refused to certify the amount of reparations due, and the matter was referred to an Examiner for a further hearing which took place April 27, 1959. After further procedings, a second report of a Division of the Commission was issued September 28, 1960 (311

I.C.C. 315). This report was adverse to the Railroads, but of the three Commissioners, Commissioner Walrath dissented and stated that the claims were barred by § 16(3). A petition for reconsideration was filed and denied by order of May 23, 1961. Thus, at no time did the full Interstate Commerce Commission ever actually review this case.

Oral argument before the Commission was requested in three separate pleadings and in each instance was denied.

3. Although the Railroads had the alternative of forcing Thomson to file suit to enforce the ICC order, it was felt that the procedural issue involved in the case justified taking the initiative in order to be sure of Court review of the alleged errors. Complaint was filed with this Court August 28, 1961. The ICC filed answer January 5, 1962. The United States answered on January 12, 1962, indicating that it would not participate in the defense.

4. The Interstate Commerce Commission filed a motion to dismiss, contending that the Railroad plaintiffs had no right to seek this review but had to wait for Thomson to file a court action to enforce the Commission order of reparation. This issue was separately briefed and argued in May 1962, and the motion was denied by order of May 15, 1962, in which it was held that the action was proper and that this Court had jurisdiction.

5. An Informal Complaint No. 174417 was filed by Thomson on March 20, 1946, pursuant to Interstate Commerce Commission Rule 25. It sought reparations on shipments "during the past two years" and did not specify a single shipment by any identifiable reference.

6. Thomson and the ICC rely on this Informal Complaint as having stayed the 2-year Statute of Limitations contained in § 16(3(b) of the Interstate Commerce Act, 49 U.S.C. § 16(2), so as to permit the filing of Docket 32065 here under review.

7. On December 4, 1947, over twenty months later, Thomson advised the ICC that Informal Complaint No. 174417 was to cover shipments "during the pendency of this proceeding".

8. On December 17, 1947, the Railroads offered to pay reparations in Informal Complaint No. 174417 "on all shipments involved in this informal complaint upon which the statute of limitations has not run".

9. This proposal was accepted by Thomson, without qualification, in January 1948, and a Special Docket application, No. 218792, was prepared and filed with the ICC. The ICC issued an order September 19, 1950, authorizing the payment to Thomson of $13,071.98, which was paid to Thomson November 17, 1950. This was pursuant to ICC Rule 25(e).

10. Thomson received and cashed the check for $13,071.98 and then on December 7, 1950, asked for additional reparations on a different basis. The Railroads repeatedly refused payment and stated that they had paid and had settled Informal Complaint 174417.

11. On July 20, 1951, however, the ICC advised that in its "informal view" Informal Complaint 174417 was still open for further claims. The Railroads thereafter took the position that they would pay no further claims, and after being requested by the Railroads several times the ICC finally advised Thomson on June 26, 1952, that it would have to comply with Rule 25(f) if it desired to pursue the matter.

12. The ICC Hearing Examiner in his report of August 1957 found Docket 32065 barred by the payment to Thomson of $13,071.98 in 1950, saying:

> "A study of the situation on September 19, 1950, leads only to the conclusion that the informal complaint had been satisfied and that no further complaint was pending.
>
> ". . . Rule 25(f) provides for notice to the parties only when an informal complaint seeking damages cannot be disposed of informally, or is denied, or is withdrawn by complainant. None of those conditions prevailed here. There is no rule which in any way tolls the statute when as in this instance an informal complaint is closed by special docket approval after a compromise has been reached. The Commission is empowered to make such general rules

as may be requisite for the order and regulation of proceedings before it and conduct its proceedings to best conduce to the proper dispatch of business and to the ends of justice, but the limitation provided by section 16(3) is jurisdictional and cannot be waived by the Commission or its staff. *Phillips* v. *Grand Trunk Ry.*, 236 U.S. 662. Nor do the ends of justice appear to require waiver of established principles of contract law that an offer in compromise when accepted results in a contract binding upon both parties, or that one cannot accept money offered in full settlement of a disputed claim and reject the conditions on which it is offered. *Yazoo & M.V.R. Co.* v. *Webb*, 64 Fed. (2d) 902."

13. Thomson filed a formal complaint in the fall of 1952 on some shipments allegedly also covered by Informal Complaint 174417 and, after a nominally contested proceeding before the ICC, was paid $1,463.80 in 1955 by check reading "payment in full of all matters in Informal Complaint 174417". The Railroads were justified in considering that this had entirely closed out the matter.

14. Nevertheless, by letter of December 19, 1952, Thomson requested reopening of Informal Complaint 174417. This letter was not supplied to the Railroads until March 21, 1956. It contained no additional facts relating to Informal Complaint 174417, yet the ICC perfunctorily reopened the Informal Complaint by letter of December 24, 1952, stating that Informal Complaint 174414 (sic) was reopened "as originally filed".

15. The effect of this letter, if the obvious error in docket number is disregarded, can at most be to reopen Informal Complaint 174417 on shipments only during the two years prior to March 14, 1946, which is the way the Informal Complaint was originally filed.

16. Again Thomson revived the matter by correspondence to the Railroads and the ICC in October 1955, after being paid the $1,463.80. After many denials of responsibility by the Railroads, the ICC finally on March 29, 1956, advised Thomson:

". . . we are again declining the complaint and directing your attention to the provisions of Rule 25(f) of our Rules of Practice."

17. On March 31, 1956, Thomson again wrote the ICC without any additional facts as required by Rule 25(f), and it requested reopening of Informal Complaint 174417; this was perfunctorily done by a subordinate Commission staff member. Again the Railroads said the matter was closed, yet the Commission staff member chose to argue the matter before finally on April 19, 1956, "again declining" to Informal Complaint and referring to Rule 25(f).

18. Docket 32065 was filed October 16, 1956, within six months after the letter of April 19, 1956, but more than six months after the letter of March 29, 1956. Thus Informal Complaint 174417 had to remain alive until April 19, 1956, if any claims survived the 2-year limitation period of 49 U.S.C. § 16(3)(b).

19. The complaint in Docket 32065 was one page in length which, even though filed years after the shipments moved, merely referred to Informal Complaint 174417 and failed to specify a single shipment; however, it took the ICC eight pages of small type to tabulate the shipments in its report at 311 I.C.C. 315, 318-27.

20. The complaint in 1956 was not signed and verified by an executive officer of Thomson as required by ICC Rule 17(b).

21. The complainant, Thomson Phosphate Co., an Illinois corporation, was sold to International Minerals and Chemicals Corp. in 1951, and was legally dissolved in 1951; nevertheless, this complaint was not filed until 1956. Illinois Law (Smith-Hurd Ill. Anno. Stat. ch. 32, § 157.94) requires that an "action or other proceeding" be commenced in two years.

22. The contract of sale of Thomson to I.M.&C. specifically reserved to Thomson the freight charge claims on shipments only between January 1, 1948, and December 31, 1950, yet Thomson seeks in 32065 to recover on shipments back to 1945. The ICC failed to apply the language

of its letter of December 24, 1952, reopening Informal Complaint 174417 "as originally filed" which only covered shipments prior to March 14, 1946.

23. Thomson was merely a broker of phosphate rock in Illinois. It never did own, mine, manufacture, store, or even touch the product. Thomson first made sales and then ordered shipment by I.M. & C., which actually paid the Railroads' freight charges. Thomson billed the receiver with all costs, specifically itemizing freight charges; it thereafter collected and paid I.M. & C. If Thomson recovers here, it will have collected part of the freight charges twice, and it will have a windfall over ten years after the corporation was dissolved.

24. The shipments here went to many different locations (over 100) in Illinois to farmers for direct application to the soil as fertilizer, whereas the material in the cases relied on by Thomson went to chemical companies at a few points.

25. The record shows no plausible or defensible reason for Thomson handling its claims in such a piecemeal, dilatory way, that has resulted in this litigation being dragged out for more than a decade.

CONCLUSIONS OF LAW

1. This action arises under, the United States is made a defendant herein in accordance with, and the jurisdiction of this court rests upon 5 U.S.C. § 1009, 28 U.S.C. §§ 1336, 1398 and 2201, and § 17(9) of the Interstate Commerce Act, 49 U.S.C. § 17(9), and F.R.C.P. 57.

2. This action is properly reviewable by a one-judge District Court instead of a three-judge Court because it involves an order for the payment of money. *Pennsylvania R.R.* v. *United States*, 363 U.S. 202, 205.

3. Venue exists under 28 U.S.C. § 1398 because Plaintiff Atlantic Coast Line Railroad Company is a corporation under the laws of Virginia, having its principal office at Jacksonville, Florida.

4. Section 16(3)(b) of the Interstate Commerce Act [49 U.S.C. § 16(3)(b)] destroys the right as well as the

remedy, and it must be strictly construed. It is jurisdictional and limits the power of the Interstate Commerce Commission to consider a complaint. [See annotations under 49 U.S.C. § 16(3)]. Accordingly, the Commission Rule 25 must also be strictly construed in this case.

5. The payment of $13,071.98 to Thomson in November 1950, pursuant to order of the ICC in Special Docket 218792, terminated Informal Complaint 174417 as provided in ICC Rule 25(e). Therefore, it was not necessary that any further action be taken, or advice be given, by the ICC to terminate the Informal Complaint under Rule 25(f), which only requires further action—

> "If an informal complaint seeking damages cannot be disposed of informally, or is denied, or is withdrawn by complainant from further consideration, the parties affected will be so notified in writing by the Commission."

Established principles of contract law regarding compromise and settlement also require the conclusion that Informal Complaint 174417 was closed out. *Y. & M. V. R. R.* v. *Webb*, 64 F.2d 902.

Accordingly, Docket 32065, filed in 1956 and covering shipments in 1950 and prior years, was barred by 49 U.S.C. § 16(3)(b), and Informal Complaint 174417 cannot be relied upon to stay the running of the 2-year limitation period.

6. The letter of December 19, 1952, from Thomson to the ICC did not contain the "additional fact basis" required by ICC Rule 25(f), and the letter of the Commission Acting Secretary dated December 24, 1952, improperly reopened Informal Complaint 174417. See *Mente & Co., Inc.* v. *C. of Ga. Ry.*, 296 I.C.C. 21; *Domestic Coke Corp.* v. *B & O.*, 168 I.C.C. 53; *Carpenter Paper Co.* v. *C. & A. R. Co.*, 171 I.C.C. 783; *South Chester Tube Co.* v. *Reading Co.*, 181 I.C.C. 613. Thus, the present Docket 32065 is also barred because Informal Complaint 174417 could not have been reopened by the ICC under Rule 25(f).

7. Thomson is likewise barred by its acceptance of the check in 1955 representing "payment in full of all matters in Informal Complaint 174417". This terminated and compromised whatever might then have been left of Informal Complaint 174417, and it could no longer stay the Statute of Limitations contained in 49 U.S.C. § 16(3)(b).

8. Additionally, Docket 32065 is barred because it was not filed within six months of the ICC letter of March 29, 1956, which declined Informal Complaint 174417. The subsequent reopening and declination on April 19, 1956, did not comply with ICC Rule 25(f) because no additional facts were submitted.

9. Although the decision of the Court is not necessarily based upon this conclusion, it is nevertheless the opinion of the Court that the complaint in Docket 32065 did not stop the running of the statute of limitations because it did not comply with ICC Rules of Practice 17(b), 25(b) and 29, which require the signing and verification by an executive officer of Thomson and that formal complaints supply the data required of informal complaints by Rule 25(b). From this conclusion, it would follow that all shipments covered by 32065 are now barred.

10. Likewise, it appears to the Court that the Informal Complaint 174417, filed in 1946, fails to satisfy Rule 25(b), and thus all shipments allegedly covered thereby are barred by 49 U.S.C. § 16(3). See *Thurston Chemical Co.* v. *A.C.L.*, 291 I.C.C. 357, 358; *N. A. Smelting Co.* v. *B&O*, 309 I.C.C. 619; *American Stores* v. *A.C. & Y.*, 310 I.C.C. 127; *Texas Gas Trans. Corp.* v. *A. & S. R.*, 310 I.C.C. 207, 208.

11. In view of the above conclusions of law which have been reached by the Court, it is unnecessary to consider:

(a) Whether or not Thomson could bring a suit in 1956, since it was an Illinois corporation dissolved in 1951.

(b) Whether or not Thomson's sale to I. M. & C. affected its rights to reparations.

(c) The reasonableness *vel non* of the rates involved.
(d) All other questions raised by the record and not specifically disposed of herein.

12. The reports of the Interstate Commerce Commission in Docket 32065, *Thomson Phosphate Co.* v. *A.C.L.*, 303 I.C.C. 25, 311 I.C.C. 315, and the related orders of September 28, 1960 and July 13, 1961 are unlawful. A judgment should accordingly be entered enjoining, setting aside, and annulling said reports and orders and holding that the complaint in 32065 was barred by the statute of limitations, 49 U.S.C. § 16(3)(b).

13. Judgment will be entered in accordance with the present Findings of Fact and Conclusions of Law.

DATED this 9th day of January, 1963.

Original signed:
WM. A. MCRAE, JR.
Judge

APPENDIX

Interstate Commerce Commission Rule 25 (49 C.F.R. 1.25) reads:

"§ 1.25 *Informal complaints seeking damages—*

(a) *Actual filing required.* Notification to the Commission that an informal complaint may or will be filed later seeking damages is not a filing within the meaning of the statute except as provided in paragraph (e) of this section.

(b) *Content.* An informal complaint seeking damages, when permitted under the act, must be filed within the statutory period, and should contain such data as will serve to identify with reasonable definiteness the shipments or transportation services in respect of which damages are sought. Such complaint should state: (1) that complainant makes claim for damages, (2) the name of each individual claimant seeking damages, (3) the names of defendants against which claim is made, (4) the commodities, the rate applied, the date when the charges were paid, by whom paid, and by whom borne, (5) the period of time within which or the specific dates upon which the shipments were made, and the dates when they were delivered or tendered for delivery, (6) the points of origin and destination, either specifically or, where they are numerous, by definite indication of a defined territorial or rate group of the points of origin and destination and, if known, the routes of movement, and (7) the nature and amount of the injury sustained by each claimant.

(c) *Statement of prior claim.* If a complaint filed under paragraph (b) or (e) of this section contains a claim on any shipment which has been the subject of a previous informal or formal complaint to the Commission, reference to such complaint must be given.

(d) *Copies.* The original of an informal complaint seeking damages must be accompanied by copies in sufficient number to enable the Commission to transmit one to each defendant named.

(e) *Special-docket proceedings.* Where the act provides for an award of damages for violation thereof and a carrier is willing to pay them, or to waive collection of undercharges, petition for appropriate authority should be filed by the carrier on the special docket in the form prescribed by the Commission. If the petition is granted an appropriate order will be entered. Such petition, when not filed in connection with an informal complaint pending before the Commission, must be filed within the statutory period and will be deemed the equivalent of an informal complaint and an answer thereto admitting the matters stated in the petition. If a carrier is unable to file such petition within the statutory period and the claim is not already protected from the operation of the statute by informal complaint, a statement setting forth the facts may be filed by the carrier within the statutory period. Such statement will be deemed the equivalent of an informal complaint filed on behalf of the shipper or consignee and sufficient to stay the operation of the statute.

(f) *Six months' rule.* If an informal complaint seeking damages cannot be disposed of informally, or is denied, or is withdrawn by complainant from further consideration, the parties affected will be so notified in writing by the Commission. The matter in such complaint will not be reconsidered unless, within six months after the date such notice is mailed, either a formal complaint as to such matter is filed, or it is informally resubmitted on an additional fact basis.

Such filing or resubmission will be deemed to relate back to the date of the original filing, but reference to that date and the Commission's file number must be made in such resubmission or in the formal complaint filed. If the matter is not so resubmitted, or included in a formal complaint, as provided in this section, complainant will be deemed to have abandoned the complaint and no complaint seeking damages based on the same cause of action will thereafter be placed on file or considered unless itself filed within the statutory period."

NOTICE OF APPEAL

(Title Omitted)

The Interstate Commerce Commission, one of the defendants in the above-entitled action, hereby takes an appeal from the judgment of the United States District Court for the Middle District of Florida, Jacksonville Division, entered on January 9, 1963, in the above-entitled action in favor of the plaintiffs and against the defendants, to the United States Court of Appeals for the Fifth Circuit. The Interstate Commerce Commission further appeals from the order of the United States District Court for the Middle District of Florida, Jacksonville Division, entered on May 15, 1962, denying the Commission's motion to dismiss the complaint, to the United States Court of Appeals for the Fifth Circuit.

Pursuant to Rule 73(b) of the Federal Rules of Civil Procedure the clerk is requested to inform the parties of record of this appeal.

Dated this 8th day of March, 1963.

Respectfully submitted,

LEONARD S. GOODMAN
Attorney
Interstate Commerce Commission
Washington 16, D. C.

ROBERT W. GINNANE
General Counsel

Attorneys for the Interstate Commerce Commission

Law Offices
of
HARRY TEICHNER

66 Court Street
Brooklyn 1, N. Y.

August 23, 1962

Leonard S. Goodman, Esq., Attorney,
Interstate Commerce Commission,
Office of the General Counsel,
Washington 25, D. C.

Re: Atlantic Coast Line R. Co. et al.
v. United States of America and
Interstate Commerce Commission,
Civil Action No. 4771-Civ-J
(G. C. File No. 1714)

Dear Mr. Goodman:

I wish to acknowledge with thanks receipt of copy of your brief in the above matter.

Please be advised that the complaint of Thomson Phosphate Company in a section 16(2) suit was filed in the United States District Court for the Southern District of New York on August 22, 1962. A copy of said complaint is enclosed herewith.

When the above-entitled case has been decided I would appreciate advice from you as to the result, and if it is possible to obtain an extra copy of the Court's opinion please furnish me with same. I shall keep you informed with respect to the progress of the section 16(2) suit.

Respectfully yours

/s/ Harry Teichner
HARRY TIECHNER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civil Action File No. 62-2911

COMPLAINT

THOMSON PHOSPHATE COMPANY, PLAINTIFF

v.

ATLANTIC COAST LINE RAILROAD COMPANY, THE NEW YORK CENTRAL RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, ALTON AND SOUTHERN RAILROAD, ATLANTA, BIRMINGHAM AND COAST RAILROAD, THE BALTIMORE AND OHIO RAILROAD COMPANY, CENTRAL OF GEORGIA RAILWAY COMPANY, CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY, THE CHESAPEAKE AND OHIO RAILWAY COMPANY, CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY, CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY, GEORGIA & FLORIDA RAILROAD (ALFRED W. JONES, RECEIVER), GEORGIA RAILROAD by lessees: ATLANTIC COAST LINE RAILROAD COMPANY, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, GULF, MOBILE AND OHIO RAILROAD COMPANY, ILLINOIS CENTRAL RAILROAD COMPANY, LOUISVILLE & JEFFERSONVILLE BRIDGE AND RAILROAD COMPANY, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, NORFOLK AND WESTERN RAILWAY COMPANY, NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY, THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, PADUCAH & ILLINOIS RAILROAD COMPANY, SAVANNAH & ATLANTA RAILWAY COMPANY, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, SOUTHERN RAILWAY COMPANY, TOLEDO, PEORIA & WESTERN RAILROAD, THE VIRGINIAN RAILWAY COMPANY, WABASH RAILROAD COMPANY,
DEFENDANTS

The plaintiff, by HARRY TEICHNER, ESQ., its attorney, complaining of the defendants, respectfully alleges:—

FIRST: That at all the times hereinafter mentioned, and prior to September 24, 1951, the plaintiff was a corporation duly organized and existing under the laws of the State of Illinois.

SECOND: That on September 24, 1951 the plaintiff corporation was dissolved by the issuance of a certificate of dissolution by the Secretary of State of the State of Illinois.

THIRD: That pursuant to the laws of the State of Illinois this action is maintainable in the name of the plaintiff corporation.

FOURTH: Upon information and belief, that at all the times hereinafter mentioned the defendant ATLANTIC COAST LINE RAILROAD COMPANY, was and now is a corporation duly organized and existing under the laws of the State of Virginia, having its principal operating office at Jacksonville, Florida.

FIFTH: Upon information and belief, that at all the times hereinafter mentioned, the defendant THE NEW YORK CENTRAL RAILROAD COMPANY was and now is a corporation duly organized and existing under the laws of the State of New York, having its principal operating office in the City, County and State of New York.

SIXTH: Upon information and belief, that at all times hereinafter mentioned ATLANTIC COAST LINE RAILROAD COMPANY and LOUISVILLE AND NASHVILLE RAILROAD COMPANY were and now are lessees of the above-named GEORGIA RAILROAD; that said GEORGIA RAILROAD was and now is an organization not a corporation, but represents said ATLANTIC COAST LINE RAILROAD COMPANY and LOUISVILLE AND NASHVILLE RAILROAD COMPANY, as lessees of the railroad property of the GEORGIA RAILROAD & BANKING COMPANY whose properties are known as the GEORGIA RAILROAD.

SEVENTH: Upon information and belief, that at all times hereinafter mentioned, the other defendants above-named were and now are corporations; that ALFRED W. JONES since June 1, 1948 was and now is the receiver of the above-named GEORGIA & FLORIDA RAILROAD.

EIGHTH: That at all the times hereinafter mentioned, the defendants were and now are common carriers by railroad, engaged in the interstate transportation of freight, and as such common carriers are subject to the provisions of the Interstate Commerce Act, and acts amendatory thereof, and supplemental thereto.

NINTH: That the roads of the defendant THE NEW YORK CENTRAL RAILROAD COMPANY run through the Southern District of New York.

TENTH: That the roads of the defendant THE PENNSYLVANIA RAILROAD COMPANY run through the Southern District of New York.

ELEVENTH: That the roads of the defendant ATLANTIC COAST LINE RAILROAD COMPANY run through the Southern District of New York.

TWELFTH: That on and between April 11, 1945 and October 21, 1950, inclusive, plaintiff made numerous shipments of ground phosphate rock, in carloads, which moved from Prairie, Florida, to destinations in Illinois over the lines of the defendant ATLANTIC COAST LINE RAILROAD COMPANY, as originating carrier, and the lines of the other defendants above named, as participating and connecting carriers, on which plaintiff paid to the defendant ATLANTIC COAST LINE RAILROAD COMPANY, and bore transportation charges at rates ranging from $6.90 to $10.26 per ton of 2240 pounds; that said payments were received by said defendant ATLANTIC COAST LINE RAILROAD COMPANY from plaintiff and were divided among the defendant carriers participating in the transportation.

THIRTEENTH: That said rates and charges for such transportation were unjust and unreasonable in violation of Section 1 of the Interstate Commerce Act.

FOURTEENTH: That the reasonable and lawful rates and charges for the transportation of said shipments should have been 75 percent of the rates on fertilizer materials on the basis approved in the proceeding before the Interstate Commerce Commission entitled *Fertilizer Between Official and Southern Territories* and reported in 232 I.C.C. 301, extended to include distances from Barstow, Florida, and increased as subsequently authorized for application on phosphate rock when the shipments moved. Reference to said report in 232 I.C.C. 301 is made for greater particularity, and the same is made a part hereof as if set forth at length herein, and plaintiff begs leave to refer to said report on the trial of this action.

FIFTEENTH: That by reason of the foregoing, the plaintiff has been subjected to the payment of rates and charges for transportation, which were when exacted unjust, unreasonable, unlawful and excessive in violation of Section 1 of the Interstate Commerce Act, and plaintiff has been damaged thereby in the sum of $8,889.76 with interest thereon from the respective dates of payment of the charges, said sum of $8,889.76 represents the amount of the difference between the charges paid and those that would have accrued at just and reasonable rates.

SIXTEENTH: That on or about October 16, 1956 plaintiff duly filed a formal complaint with the Interstate Commerce Commission (hereinafter called the Commission), wherein the plaintiff herein was designated as the complainant, and the defendants herein were designated as defendants, alleging the aforesaid violations of the Interstate Commerce Act and praying that plaintiff be awarded reparation for the damage it sustained thereby.

SEVENTEENTH: That after hearing the said case, hearing I.C.C. Docket No. 32065, the Commission made its report on February 10, 1958, finding that the rates assailed were unjust and unreasonable to the extent that they exceeded 75 percent of the rates on fertilizer materials on the basis approved in *Fertilizer Between Official and Southern Territories*, 232 I.C.C. 301, extended to

include distances from Barstow, Florida, and increased as subsequently authorized for application on phosphate rock when the shipments moved; and further finding that plaintiff made the shipments, and paid and bore the charges thereon at rates found in said report to have been unjust and unreasonable; that plaintiff was damaged thereby in the amount of the difference between the charges paid and those which would have accrued at the rates found in said report to have been just and reasonable, and is entitled to reparation with interest; and that plaintiff should comply with rule 1.100 of the General Rules of Practice of the Interstate Commerce Commission. That said report appears in 303 Interstate Commerce Commission Reports 25, reference to which report is made for greater particularity, and the same is made a part hereof as if set forth at length herein, and plaintiff begs leave to refer to said report on the trial of this action.

EIGHTEENTH: That a petition by the defendants for reconsideration of the findings in said report, 303 I.C.C. 25, was denied by the Commission on July 23, 1958.

NINETEENTH: That statements were filed with the defendants by the plaintiff containing details of the aforesaid shipments, in compliance with the requirements of said rule 1.100 of the General Rules of Practice of the Interstate Commerce Commission, but the defendants declined to certify any of the statements, and upon request of the plaintiff, the proceeding was reopened for further hearing, solely for the purpose of determining the amount of reparation due the plaintiff under the findings in said report, 303 I.C.C. 25.

TWENTIETH: That after such further hearing, a recommended report and order were issued, wherein the Commission examiner found that the plaintiff was entitled to reparation in the total amount of $8,889.76, with interest, on the shipments, of record, listed in appendix A to the report of the Interstate Commerce Commission, 311 I.C.C. 315. Reference to said report in 311 I.C.C.

315 is made for greater particularity, and the same is made a part hereof as if set forth at length herein, and plaintiff begs leave to refer to said report on the trial of this action.

TWENTY-FIRST: That subsequently, a petition for leave to file a petition for reconsideration of the findings in the said prior report, 303 I.C.C. 25, filed by the defendants, was denied by the Commission on June 23, 1960.

TWENTY-SECOND: That after said further hearing and the issuance of said recommended report and order by the examiner, the Commission made and entered its report and order on September 28, 1960 finding that the plaintiff is entitled to reparation from the defendants in the amounts set opposite their respective names in appendix C of said report, aggregating $8,889.76, with interest, and directing that the defendants named in appendix A to the report, 311 I.C.C. 315, according as they participated in the transportation, as shown in said appendix C of said report, pay to the plaintiff, on or before December 1, 1960, the sum of $8,889.76 with interest thereon at the rate of 4 percent per annum from the dates the unjust and unreasonable charges were collected, as reparation on account of unjust and unreasonable rates charged for the transportation of 639 carloads of ground phosphate rock from Prairie, Florida, to numerous destinations in Illinois, on and between April 11, 1945 and October 21, 1950, all as described in the aforesaid reports, 303 I.C.C. 25 and 311 I.C.C. 315. That said report made by the Commission on September 28, 1960 appears in 311 I.C.C. 315, and reference thereto is made for greater particularity, and the same is made a part hereof as if set forth at length herein, and plaintiff begs leave to refer to said report on the trial of this action. That a copy of said order made by the Interstate Commerce Commission on September 28, 1960 is annexed hereto, marked Exhibit 1, and made a part of this complaint.

TWENTY-THIRD: That thereafter a petition was filed with the Commission by the defendants for recon-

sideration of the aforesaid reports, 303 I.C.C. 25 and 311 I.C.C. 315, and the aforesaid order, Exhibit 1 hereof, and thereupon the Commission stayed said order pending disposition of the said petition. That thereafter said petition for reconsideration was denied by the Commission on May 23, 1961.

TWENTY-FOURTH: That thereafter and on July 13, 1961 an order was made by the Commission vacating the aforesaid order, dated September 28, 1960, Exhibit 1 hereof, only insofar as it required compliance on or before December 1, 1960, and modifying said order so as to require compliance on or before August 28, 1961, without otherwise changing the requirements of said order. That a copy of said order made on July 13, 1961 is annexed hereto, marked Exhibit 2, and made a part of this complaint.

TWENTY-FIFTH: Upon information and belief, that the aforesaid reports and orders were duly served on the defendants.

TWENTY-SIXTH: That the plaintiff has duly demanded payment of said award of reparation, but the defendants have failed and refused to pay same, or any part thereof.

TWENTY-SEVENTH: That prior to the filing of said formal complaint the aforesaid shipments were the subject of an informal complaint alleging unreasonableness under Section 1 of the Interstate Commerce Act, filed with the Interstate Commerce Commission by the plaintiff against the defendants, on or about May 20, 1946, as amended on or about December 4, 1947; that the defendants having failed to adjust the informal complaint, as amended, the same was closed on or about June 26, 1952, but was thereafter reopened, and it was finally declined and closed by the Commission on April 19, 1956.

TWENTY-EIGHTH: That this suit is instituted by plaintiff against the defendants under the Interstate Commerce Act and the amendments thereof.

WHEREFORE, plaintiff demands judgment against the defendants for the sum of $8,889.76, together with interest thereon from the respective dates of plaintiff's payment of the said charges, together with costs, including a reasonable attorney's fee.

/s/ Harry Teichner
HARRY TEICHNER
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[52] *Minute entry of argument and submission.—April 16, 1964*

[Omitted in printing]

[54] In the United States Court of Appeals for the Fifth Circuit

No. 20485

INTERSTATE COMMERCE COMMISSION, APPELLANT

versus

ATLANTIC COAST LINE R. CO. ET AL., APPELLEES

Appeal from the United States District Court for the Middle District of Florida

Opinion—July 8, 1964

Before TUTTLE, Chief Judge, and POPE* and BROWN, Circuit Judges

BROWN, *Circuit Judge:* The question in this case—arising for the first time in the 75-year operation of the Interstate Commerce Act—is whether a carrier may sue to set aside a reparation award of the Commission under § 16(1) by a suit under § 17(9), 28 USCA §§ 1336, 1398, 2321–23, or must confine its challenge as a defense [55] in the Shipper's suit when, where and as brought under § 16(2). The District Court upheld the right. The ICC, joined by an array of shipper interests, spiritedly challenges the holding. We think the attack is unavailing and affirm.

The facts are very simple. In response to the complaint of the Shipper,[1] the ICC awarded reparations in the amount of $8,889.76 with interest, for unjust and unreasonable rates collected for phosphate movements from Florida to Illinois during the period April 10, 1945, to December 31, 1950.[2] The order

*Of the Ninth Circuit, sitting by designation.

[1] Thomson Phosphate Company.

[2] *Thomson Phosphate Co.* v. *Atlantic Coast Line R.R.*, 1953, 291 ICC 1, 1954, 293 ICC 369, 1958, 303 ICC 25. Not surprisingly, one of the Carrier's defenses is that in this long span of years even an impersonal corporate person had expired.

called for payment on or before August 28, 1961, the effective date of compliance, *Missouri Pacific R.* v. *Austin*, 5 Cir., 1961, 292 F. 2d 415, 418–19. On September 6, 1961, the Carrier-appellees filed a suit in the Middle District of Florida, the venue district of Atlantic Coast Line to set aside the order. Long thereafter, on August 22, 1962, the Shipper filed suit against the Carrier and other railroads under § 16(2) in the Southern District of New York for the amount of the award with interest and, of considerable importance here, attorney's fees. The Court below overruled the ICC's motions to dismiss which asserted the exclusive method of review is under § 16(2). Thereafter, on the merits, it held the award and order invalid, primarily because of the statute of limitations. 213 F. Supp. 199.[3]

[56] The ICC asserts that the sole review of an order granting reparations under § 16(1)[4] is that provided in § 16(2).[5]

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[3] By an agreed statement of the case on appeal, F.R. Civ. P. 76, the appeal presents only the question of jurisdiction. No attack is made on the District Court's decision on the merits.

[4] 49 USCA § 16(1):

"If, after hearing on a complaint made as provided in section 13 of this title, the commission shall determine that any party complainant is entitled to an award of damages under the provisions of this chapter for a violation thereof, the commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named."

[5] Section 16(2) of the Interstate Commerce Act, 49 USCA § 16(2) provides:

"If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the district court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any State court of general jurisdiction having jurisdiction of the parties, a complaint setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated, and except that the plaintiff shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the plaintiff shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit."

The Carrier, on the other hand, insists that § 17(9)[6] expressly authorizes "a suit to enforce, enjoin, suspend, or set aside" an order, thus setting in train [57] the jurisdictional-procedural provisions of 28 USCA §§ 1336,[7] 1398,[8] 2321,[9] 2322,[10] and 2323.[11]

The ICC's approach is a dual one. It contends, first, that construction of all of the statutes together manifests a congres-

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[6] 49 USCA § 17(9):

"(9) When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or a board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise."

[7] 28 USCA § 1336:

"Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission."

[8] 28 USCA § 1398:

"Except as otherwise provided by law, any civil action to enforce, suspend or set aside in whole or in part an order of the Interstate Commerce Commission shall be brought only in the judicial district wherein is the residence or principal office of any of the parties bringing such action."

[9] 28 USCA § 2321:

"The procedure in the district courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission other than for the payment of money or the collection of fines, penalties and forfeitures, shall be as provided in this chapter.

"The orders, writs, and process of the District Courts may, in the cases specified in this section and in the cases and proceedings under sections 20, 23, and 43 of Title 49, run, be served, and be returnable anywhere in the United States."

[10] 28 USCA § 2322:

"All actions specified in section 2321 of this title shall be brought by or against the United States."

[11] 28 USCA § 2323:

"The Attorney General shall represent the Government in the actions specified in section 2321 of this title * * *.

"The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party. * * *."

sional purpose to restrict review of a reparations award to the Shipper's suit under § 16(2). Next, both as a part of that argument, and independent of it, the ICC further asserts that there is no reviewable final "order" as called for in §§ 17(9), 1336 or 1398.

[58] These arguments stress the non-self-executing aspects of a reparation award. Since they are "for the payment of money," the Carrier is not bound to comply under the imminence of a mandatory injunction suit brought by the ICC or the United States. § 16(12), 49 USCA § 12(12). Emphasizing that § 16(2) provides only that "the findings and order of the Commission shall be prima facie evidence of the facts therein stated," the ICC urges isolated excerpts from early opinions of the Supreme Court to suggest that it is really not an order at all. Thus *Mills* v. *Lehigh Valley R.R.*, 1915, 238 U.S. 473, 482, 35 S. Ct. 888, 59 L. Ed. 1414, had this to say of § 16(2): "The statutory provision merely established a rule of evidence. It leaves every opportunity to the * * * [Carrier] to contest the claim." [12]

[59] But we have no doubt that this award has all of the characteristics of finality so far regarded as essential to court review under statutes comparable to those here involved.

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[12] At the same term the Court stated in *Meeker & Co.* v. *Lehigh Valley R.R.*, 1915, 236 U.S. 412, 430, 35 S. Ct. 328, 59 L. Ed. 644: "This provision only establishes a rebuttable presumption. It cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury. At most therefore it is merely a rule of evidence. It does not abridge the right of trial by jury or take away any of its incidents."

Its sweeping assurance of a jury trial and "contestation of all the issues, * * * of fact" must now be read with considerable reservation. All acknowledge that under the doctrine of primary jurisdiction the § 16(2) court may not independently determine the merits of the unjustness or unreasonableness of rates, discriminatory practices, and the like. We may assume, without deciding, that review of such "administrative" matters subject to the expertise of the ICC in a § 16(2) suit is no less than in one under §§ 1336, 1398. It is clear that it is not greater. *New Process Gear Corp.* v. *New York Central R.R.*, 2 Cir., 1957, 250 F. 2d 569, 572, cert. denied, 1958, 356, U.S. 959, 78 S. Ct. 996, 2 L. Ed. 2d 1066, citing *United States* v. *ICC*, 1949, 337 U.S. 426, 69 S. Ct. 1410, 93 L. Ed. 1451; *Mitchell Coal & Coke Co.* v. *Pennsylvania R.R.*, 1913, 230 U.S. 247, 33 S. Ct. 916, 57 L. Ed. 1472: *Glens Falls Portland C. Co.* v. *Delaware & Hudson Co.*, 2 Cir., 1933, 66 F. 2d 490, cert. denied, 1933, 290 U.S. 697, 54 S. Ct. 132, 78 L. Ed. 599.

Rochester Tel. Corp. v. *United States*, 1939, 307 U.S. 125, 59 S. Ct. 754, 83 L. Ed. 1147; *Columbia Broadcasting System* v. *United States*, 1942, 316 U.S. 407, 62 S. Ct. 1194, 86 L. Ed. 1563; *Frozen Food Express* v. *United States*, 1956, 351 U.S. 40, 76 S. Ct. 568, 100 L. Ed. 910; *United States* v. *Storer Broadcasting Co.*, 1956, 351 U.S. 192, 76 S. Ct. 763, 100 L. Ed. 1081; *El Dorado Oil Works* v. *United States*, 1946, 328 U.S. 12, 66 S. Ct. 843, 90 L. Ed. 1053. An award-order is, first, administratively final. Nothing further remains to be done by the ICC. It is not a declaration of consequences dependent on further, future action. Rather, it is positive and presently operative. It declares, first, the violation of the Act (unreasonable, unjust rates, and the like) and then finds the amount of the Shipper's claim. On the two findings, it directs the payment of the award. And as *United States* v. *ICC*, 1949, 337 U.S. 426, 432–33, 69 S. Ct. 1410, 93 L. Ed. 1451, and *Pennsylvania R.R.* v. *United States*, 1960, 363 U.S. 202, 205, 80 S. Ct. 1131, 4 L. Ed. 2d 1165, made clear, finality for the purposes of review is not to be determined solely by the terms of the order, but by whether such order "if upheld" forecloses a right or imposes an obligation. Assuming that a § 16(2) suit is necessary for the Shipper to coerce payment, the resulting court judgment is to "uphold" the award, to hold it valid. In that judicial result, the administrative proceedings have not in any sense been superseded. The critical finding of a violation of the Act as an essential ingredient to recovery rests wholly [60] and entirely upon the administrative decision of the ICC, not independent court determination, since recovery by the Shipper assumes that the primary jurisdiction aspect has withstood the restricted review, see note 12, *supra*.

Bearing in mind that the problem here is the determination of the statutory mechanism for review in reparation award order cases generally, not merely the machinery which would satisfy this particular case, we perceive additional factors giving final operative effect to the award-order no matter what happened in the Shipper's § 16(2) suit.

An award-order is in two parts, (1) the determination of violation of statutory policies, unjust, unreasonable rates, discriminatory practices, or the like, and (2) specific damage to

the shipper-complainants. So long as element (1) is outstanding and not set aside, it affords the basis for a § 9 suit, 49 USCA § 9, by a shipper similarly situated without his first going through a reparation proceeding. And in *Phillips* v. *Grand Trunk W. Ry.*, 1915, 236 U.S. 662, 35 S. Ct. 444, 59 L. Ed. 774, and many others, the Court has held that a person not a party complainant to a proceeding before the ICC may, on the general finding that the rate was unjust and unreasonable, bring his independent suit in court. Of the administrative finding that the rates were unjust and unreasonable, the Court said the "finding * * * was general in its operation and inured to the benefit of every person that had been obliged to pay the unjust rate. Otherwise those who filed the complaint or [61] intervened during the [Commission] hearing, would have secured an advantage over the general body of the public, with the result that the order of the Commission would have created a preference in favor of the parties to the record and would have destroyed the very uniformity which that body had been organized to secure." 236 U.S. 662, at 665. In addition, there is a substantial indication that in the day-to-day operations of the ICC in the fabrication and building of its own formidable body of transportation law, reparation order-awards announcing principles are regarded as precedents. Thus the opinion reports of the ICC here, note 2, *supra*, until set aside by a direct proceeding, remain outstanding precedents on the question of the statute of limitation notwithstanding the possibility that in the § 16(2) suit in the Southern District of New York a jury might bring in a verdict for the Carrier. Even 100% success in the § 16(2) suit leaves the Carrier faced with unsatisfactory law for all to use and unsatisfactory fact findings for all shippers to use.

Symmetry also suggests a congressional purpose to allow review of an award-order granting reparations under § 17(9). It is unquestioned that if the Commission denies the Shipper's reparation complaint, review may properly be had under §§ 1336, 1398. *Cf. United States* v. *ICC*, 1949, 337 U.S. 426, 69 S. Ct. 1410, 93 L. Ed. 1451. And in a § 9 suit, 49 USCA § 9, the administrative determination of primary jurisdiction elements on a referral to the ICC by a Court is reviewable under

§§ 17(9), 1336, 1398. *Pennsylvania R.R.* v. *United States*, 1960, 363 U.S. 202, 80 S. Ct. 1131, 4 L. Ed. 2d 1165.

[62] Against this massive structure of injunctive reviewability, the Commission's thesis comes down to the assertion that Congress meant to allow court review of the grant of an award-order granting reparation only in the shipper's § 16(2) suit. In so doing, stress is laid on the procedural advantages given the shipper—(1) freedom from court costs, (2) attorney's fees if successful, (3) choice of venue, and (4) relief from the burden of making out a prima facie case by introducing in evidence the administrative findings and order. Urged as a fitting, railroad analogy is the statutory mechanism for awards under the Railway Labor Act, 45 USCA §§ 151, 153 First (p). Under this provision, an employee who has obtained an award of the National Railroad Adjustment Board may file suit in the District Court for enforcement if the carrier does not comply with the agency order. The order is prima facie evidence of the facts therein stated. In *New Orleans Public Belt R. Commission* v. *Ward*, 5 Cir., 1950, 182 F. 2d 654, following *Washington Terminal Co.* v. *Boswell*, D.C. Cir., 1941, 124 F. 2d 235, affirmed by an equally divided court, 1943, 319 U.S. 732, 63 S. Ct. 1430, 87 L. Ed. 1694, we held that a carrier could not circumvent this statutory right of the employee by resorting to a declaratory judgment suit.

We think the resemblance is superficial. We would think also that to import into the highly specialized aspects of carrier regulation and the statutory scheme of determination and review especially contrived for it, the cumbersome and frequently difficult distinctions between major and minor, between court decision and [63] Adjustment Board decision, between Adjustment Board and Mediation Board, between Court and Mediation Board will hinder, not help, in achieving judicial review which is clearly guaranteed under the Administrative Procedure Act. 5 USCA §§ 1009, 1001 (d), (f), and (g).

Many reasons may be briefly summarized. The actions of the Railway Adjustment Board are not subject to the Administrative Procedure Act. The provision of 45 USCA § 153 First (p) expressly invests the Court with power to "enter such judgment, by writ of mandamus or otherwise, as may be ap-

propriate to enforce or set aside the order of the * * * Board." At the same time there is no other statutory grant of review as in § 17(9). An Adjustment Board proceeding resulting in a money award carries forward no elements of primary jurisdiction with limited, restricted judicial review. Such an award is open for full review. *Hodges* v. *Atlantic Coast Line R.R.*, 5 Cir., 1962, 310 F. 2d 438. Probably most important, that structure is hardly a model to be copied.[13]

The procedure invoked by the Carrier here is fair and efficient. Brought in the same single Judge District Court [14] in which the Shipper's complaint would be filed [64] complaining of a denial of a § 16(1) reparation award or to review an unsatisfactory finding in a court referral proceeding upon which to base a § 9 suit, there may be a determination once and for all of the underlying validity of the Commission's findings with respect to violations of the Act (unjust, unreasonable rates, discriminatory practices, etc.). If the order *vis-a-vis* the ICC and the Carrier fails to pass muster and is therefore "not in accordance with law," 5 USCA § 1009(e), it may then be set aside. No one, whether Carrier or Shipper, will thereafter be subjected to the expense of useless litigation in numerous courts where separate § 16(2) shipper suits have been filed.

More important, this assures some symmetry in the construction and maintenance of a national transportation policy. In the injunction suit, §§ 17(9), 1336, 1398, the United States and the ICC are parties. The Attorney General and the General Counsel of the Commission are directly and immediately responsible for the conduct of that litigation and the advocative assertion of contentions deemed essential in the public interest. This is all the more essential where, as is quite frequent, there is an outright clash between the executive de-

[13] The dissenting opinions in *Pennsylvania R.R.* v. *Day*, 1959, 360 U.S. 548, 554, 79 S. Ct. 1322, 3 L. Ed. 2d 1422; *Union Pacific R.R.* v. *Price*, 1959, 360 U.S. 601, 617, 79 S. Ct. 1351, 3 L. Ed. 2d 1460, pointing up serious constitutional questions emphasize what they describe as the one-sided nature of judicial review: the employee loses, he has no right of review whatsoever; the employee wins, the carrier loses, the carrier has unlimited review on facts and law.

[14] *United States* v. *ICC*, 1949, 337 U.S. 426, 69 S. Ct. 1410, 93 L. Ed. 1451; *Pennsylvania R.R.* v. *United States*, 1960, 363 U.S. 202, 80 S. Ct. 1131, 4 L. Ed. 2d 1165.

partments of the Government, the Attorney General, and the Commission. See *United States* v. *ICC*, 1949, 337 U.S. 426, 69 S. Ct. 1410, 93 L. Ed. 1451. In contrast, of course, in the Shipper's § 16(2) suit neither the Commission nor the Government is a party. Intervention, whether permissive or as a matter of right, is something less than satisfactory especially with the pendency of a number of shipper suits in a number of juris[65]dictions. Without intervention, the sole spokesman in behalf of the ICC's order is the private party seeking partisan relief opposed by formidable, experienced, competent counsel for the Carrier.

We cannot believe that these important considerations were derailed by Congress out of its statutory desire to accord to a Shipper some procedural benefits. Indeed, with respect to the element of shipper damage, it is entirely too soon to state that a Shipper may not under appropriate circumstances obtain the benefit of all, or a part, of these statutory advantages by intervening in the injunction proceeding. And considering the great flexibility open to an equity court, the conclusion reached here that an injunction suit may be maintained by the Carrier does not force that Court to take on the adjudication of all of the damage element claims of numerous shippers. Wide latitude would be allowed to fashion appropriate, preliminary machinery by which shipper suits could be filed in appropriate venue districts and stayed pending ultimate determination of the injunction proceeding. A decree sustaining basic validity would likely leave for the individual § 16(2) suits only the limited issue of money damage, presumably a relatively simple matter for court or jury determination with the Shipper armed, as he is, with the working presumption from the prima facie case.

The District Court was, therefore, correct in overruling the motion to dismiss, in sustaining the right of judicial review in that Court under §§ 1336, 1398, and in [66] rejecting the contention that review had to be in the § 16(2) suit pending in New York.[15]

Affirmed.

[15] The ICC's contention that the trial court, having jurisdiction, should nevertheless have declined to exercise it for equitable considerations is without merit.

[67] In the United States Court of Appeals
for the Fifth Circuit

October Term, 1963

No. 20485

D.C. Docket No. 4771-Civil-J

INTERSTATE COMMERCE COMMISSION, APPELLANT

versus

ATLANTIC COAST LINE R. CO. ET AL., APPELLEES

Appeal from the United States District Court for the Middle District of Florida

Before TUTTLE, Chief Judge, and POPE* and BROWN, Circuit Judges

Judgment—July 8, 1964

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

JULY 8, 1964.

Issued as Mandate: July 30, 1964.

[68] [Clerk's certificate to foregoing transcript omitted in printing]

*Of the Ninth Circuit, sitting by designation.

[69] Supreme Court of the United States

October Term, 1964

No. ——

INTERSTATE COMMERCE COMMISSION, PETITIONER

vs.

ATLANTIC COAST LINE R. CO. ET AL.

Order extending time to file petition for writ of certiorari—October 6, 1964

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled case be, and the same is hereby, extended to and including October 20, 1964.

HUGO L. BLACK,
Associate Justice of the Supreme Court of the United States.

Dated this 6th day of October 1964.

[70] Supreme Court of the United States

October Term, 1964

No. 606

INTERSTATE COMMERCE COMMISSION, PETITIONER

vs.

ATLANTIC COAST LINE R. CO. ET AL.

Order allowing certiorari—January 18, 1965

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No.

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

ATLANTIC COAST LINE R. CO., ILLINOIS CENTRAL R. CO., CHICAGO & EASTERN ILLINOIS R. CO., THE BALTIMORE & OHIO R. CO., CHICAGO, BURLINGTON & QUINCY R. CO., CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC R. CO., GULF, MOBILE & OHIO R. CO., THE NEW YORK CENTRAL R. CO., WABASH RAILROAD CO., RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Interstate Commerce Commission prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered July 8, 1964. The judgment affirmed a judgment of the United States District Court for the Middle District of Florida, entered January 9, 1963.

OPINION BELOW

The District Court entered its order denying petitioner's motion to dismiss on May 15, 1962 (R. 26).

The same court entered an opinion and judgment on January 9, 1963, reaffirming its jurisdiction to review the reports and orders of the Commission herein and deciding that the same are unlawful and should be set aside (R. 4, 27, 28–37); this opinion is reported at 213 F. Supp. 199. The opinion of the Court of Appeals and its order affirming the decision of the District Court (Appendix 1a, 14a), are reported in 334 F. 2d 46.

JURISDICTION

The final order of the Court of Appeals was entered July 8, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Where the Interstate Commerce Commission entered an order awarding reparations to a shipper against railroads did the district court have jurisdiction under Section 17(9) of the Interstate Commerce Act and 28 U.S.C. §§ 1336, 1398, to review the order in a suit brought by the railroads, or was it required to relegate the railroads to the defense of a suit brought by the shipper under Section 16(2) of the Act, thereby preserving the venue and other advantages which Section 16(2) affords to shippers?

2. If the district court possessed the requisite jurisdiction, should it nevertheless have dismissed the railroads' complaint in the exercise of a sound judicial administration, and deferred to the shipper's suit filed pursuant to section 16(2)?

STATUTES INVOLVED

The statute primarily involved is the Interstate Commerce Act, Act of February 4, 1887, 24 Stat. 379, as amended, 49 U.S.C. §§ 1 *et seq.* Portions of this Act specifically involved include sections 16(2) and 17(9), 49 U.S.C. §§ 16(2), 17(9). Other statutes which are necessarily involved, because of their relation to this Act and to the nature of the suit brought by the respondents, are 28 U.S.C §§ 1336, 1398. Petitioners also rely on the Railway Labor Act, 44 Stat. 577, as amended, 45 U.S.C. §§ 151 *et seq.* for provisions closely analogous to section 16(2) of the Interstate Commerce Act, particularly section 3 First (p) of the Labor Act, 45 U.S.C. § 153 First (p). The provisions of these statutes relevant to this case are set forth in the Appendix at 15a–17a.

STATEMENT OF THE CASE

After various administrative proceedings, the Commission issued a report finding that the rates charged the Thomson Phosphate Company on several shipments of phosphate rock from Florida to Illinois during a period extending from 1945 to 1950 were unjust and unreasonable and that the shipper was entitled to reparation.[1] When the railroads (respondents herein) refused to certify the shipper's statements showing the shipments made in the period under review, the Commission reopened the pro-

[1] *Thomson Phosphate Co.* v. *Atlantic Coast Line R. Co.*, 303 I.C.C. 25 (1958); R. 6–13.

ceeding for rehearing and determination of the exact amount of reparation due. Following these additional proceedings, the Commission issued its report on September 28, 1960, finding that Thomson was entitled to reparation from the carriers of $8,889.76 with interest,[2] and entered an order authorizing and directing respondents to pay such sum on or before December 1, 1960, later extended to August 28, 1961 (R. 18–19).

As it was the carriers' choice under the statute whether to pay or not to pay the reparation prior to enforcement of the order, the carriers chose not to pay (R. 3). Upon the failure of the carriers to pay the award, shipper Thomson filed suit pursuant to section 16(2) of the Interstate Commerce Act on August 22, 1962, to enforce the Commission's order and to collect its money in the United States District Court for the Southern District of New York in a suit entitled *Thomson Phosphate Company* v. *Atlantic Coast Line R. Co., et al.,* Civil Action No. 62–2911 (R. 3, 41–49).

Prior to the institution of the foregoing suit in New York, the affected carriers brought the present suit in Florida attacking the same report and order. The Commission moved the district court to dismiss this complaint, citing the exclusivity of section 16(2) and specifically bringing the pendency of the New York suit to the Florida court's attention during the course of the litigation. The court denied the motion

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[2] *Thomson Phosphate Co.* v. *Atlantic Coast Line R. Co.*, 311 I.C.C. 315 (1960); R. 14–17.

(R. 26). The National Industrial Traffic League, the largest single shipper organization in the country, was denied intervention as an appellant in the present suit, but was permitted to file a brief *amicus curiae.*

The district court set aside the report and order of the Commission upon concluding that it had jurisdiction under section 17(9) of the Interstate Commerce Act and 28 U.S.C. §§ 1336, 1398, 2201, and that the order was barred by the statute of limitations. (R. 27–39). The Court of Appeals affirmed the jurisdiction of the district court. (App. 1a *et seq.*).

REASONS FOR GRANTING THE WRIT

Section 16(2) of the Interstate Commerce Act provides that if a railroad does not comply with a Commission order for the payment of money, the shipper may bring suit in the district court of the United States for the district, (1) in which he resides, (2) in which is located the principal operating office of the carrier, or (3) through which the railroad runs, or in any State court of general jurisdiction having jurisdiction of the parties. In addition to the obvious advantages to the shipper of such choice of venue, Section 16(2) also provides that the shipper shall not be liable for costs in the district court ("nor for costs at any subsequent stage of the proceeding unless they accrue upon his appeal"), and that if he finally prevails he shall be entitled to a reasonable attorney's fee as a part of the costs. We submit that the Congress intended the specific procedures of Section 16 (2) to be the exclusive method for judicial review of

an order of the Commission which awards reparations, and that the court below erred in holding that such an order may be challenged in a suit brought by a carrier under the provisions of 49 U.S.C. § 17(9) and 28 U.S.C. §§ 1336, 1398, which generally govern the review of Commission orders.[3]

So far as we can ascertain, the decision below is unprecedented in holding that a railroad may institute a proceeding for judicial review of a Commission order awarding reparations to a shipper. However, the instant case is one of five suits now pending in various courts in which the railroads are now uniquely attempting to attack different reparation orders entered by the Commission, rather than await suits by shippers to enforce these orders under section 16(2) of the Act and assert their claims as defenses to such shipper suits.[4] Three of these other suits have been stayed pending the final determination of the present suit.[5] In the fourth, the United States District Court for the District of Vermont has entered an order dissolving a temporary restraining order and denying a temporary injunction, and has heard argument and

[3] The parties and the court below concur in the view that the special three-judge court provisions of 28 U.S.C. §§ 2321–2325 do not here apply.

[4] The latter and normal procedure for the enforcement and review of reparation orders is described in detail in *Meeker* v. *Lehigh Valley R. Co.*, 236 U.S. 412, 422.

[5] *Atlantic Coast Line R. Co., et al.* v. *United States, et al.*, C.A. No. 63–145-Civ.-J, U.S.D.C., M.D. Fla.; *Baltimore & Ohio R. Co., et al.* v. *United States, et al.*, C.A. No. 14897, U.S.D.C., D. Md.; and *Baltimore & Ohio R. Co., et al.*, v. *United States, et al.*, C.A. No. 15279, U.S.D.C., D. Md.

taken under advisement the question of dismissing the complaint.[6]

It is settled that general principles or statutory provisions relating to judicial review of administrative orders do not apply where Congress has expressed a purpose that the validity of a defined class of orders is to be determined by the courts in a specified procedure. *United States* v. *Ruzicka,* 329 U.S. 287; Section 10(b) of the Administrative Procedure Act, 5 U.S.C. § 1009(b). The decision below, by permitting court review at the suit of the railroad, defeats the plain Congressional purpose of requiring that the validity of orders awarding reparations be determined by the courts only in suits brought by shippers under Section 16(2) with the attendant advantages which the Congress has granted to shippers.

As to venue alone, the matter is important to shippers. Proceeding under Section 16(2), a shipper may bring suit in the Federal judicial district in which he resides; if the railroad may institute a suit attacking the reparation order, it must be brought in the judicial district in which the railroad (or one of several respondent railroads) has its principal office—which may be (as in this case) geographically remote from the shipper's chosen forum. The practical impact of the shipper's loss of his choice of venue and the ensuing increase in his litigation costs, is revealed by a review of the 22 reparation orders decided by the Commission in 1963 showing that the reparation

[6] *Central Vermont Ry. Inc., et al.* v. *United States, et al.,* C.A. No. 4010, U.S.D.C., D. Vt.

awards varied from $38.39 to $77,436.99 for a median of $853.87.[7] Clearly, the decision below, in permitting the railroad to bring a suit in the district of its venue, will discourage shippers with small claims from defending Commission orders awarding reparations to them.

The Congressional purpose in providing for attorney's fees and costs for successful shipper plaintiffs has been summarized by this Court in *Baldwin* v. *Scott County Milling Co.*, 307 U.S. 478, 482–483, as follows:

> * * * By thus laying on the carriers the burden of bringing forward evidence to overcome presumptions created against them, and by compelling them, if defeated, to pay plaintiffs' attorneys' fees in addition to the interest allowed by law, the Act unmistakably evidences purpose directly to prevent interposition of pleas lacking merit and so coercively to bring about prompt payment of the commission's awards. In *Meeker & Co.* v. *Lehigh Valley R. Co.*, 236 U.S. 412, this Court, upholding the clause as to attorneys' fees, said (p. 433): "The provision is leveled against common carriers engaged in interstate commerce, a *quasi* public business, and is confined to cases wherein a recovery is had for damages resulting from the carrier's violation of some duty imposed in the public interest by the Act to Regulate Commerce * * * One of its purposes is to promote a closer observance by carriers of the duties so

[7] The 22 orders exclude the many other informal complaints settled on the basis of these orders.

> imposed; and that there is also a purpose to encourage the payment, without suit, of just demands does not militate against its validity. And in *St. Louis & S.F. R. Co.* v. *Spiller,* 275 U.S. 156, referring to the same provision, we said (p. 159): "The purpose of Congress in making the provision concerning costs was to discourage harassing resistance by a carrier to a reparation order."

There has been no intervening change in the pertinent statutory provisions which would sustain the result reached by the decision below. To the contrary, while the court below relied heavily upon the general jurisdictional provisions of 28 U.S.C. §§ 1336, 1398, it overlooked that in the 1948 codification of Title 28, both sections were prefaced, respectively by the phrases "Except as otherwise provided by Act of Congress" and "Except as otherwise provided by law," and that these exceptions were identified, in the Reviser's Notes to Section 1398, with "section 16 of Title 49, U.S.C., 1940, ed., which provides for *jurisdiction and venue* of actions to enforce Interstate Commerce Commission orders for the payment of money" [emphasis added].

The court below apparently permitted this unique suit by the carriers outside of Section 16(2) on three grounds, none of which, in our view, sustains impairment of a clear Congressional policy.

(a) The court below apparently believed that to permit such a suit by a railroad would avoid multiple suits by shippers who rely upon the Commission's

findings in a single reparations case.[8] To begin with, the appellees have not yet demonstrated that such multiple suits are in fact a real burden upon railroads. Moreover, shippers' rights should not be determined in litigation of which they may have no knowledge. Finally, for forty years it has been the settled law that the possibility of multiple suits by shippers under Section 16(2) is not such "multiplicity of suits" as would warrant depriving them of advantages conferred by the Congress. *Pittsburgh & W.V. Ry. Co.* v. *United States,* 6 F. 2d 646, 649 (W.D. Pa. (3 judge court) 1924).

(b) Secondly, the court below further concluded that "Symmetry also suggests a Congressional purpose to allow review of an award-order granting reparations under § 17(9)." (App. 9a.) This conclusion of the lower court was predicated upon the propositions, that under *United States* v. *I.C.C.,* 337 I.C.C. 426, a shipper may obtain judicial review of a Commission order denying reparations pursuant to the general provisions of 28 U.S.C. §§ 1336, 1398, and that "the administrative determination of primary jurisdiction elements on a referral to the ICC by a Court is reviewable under §§ 17(9), 1336, 1398. *Pennsylvania R.R.* v. *United States,* 1960, 363 U.S. 202 * * *" (App. 9a). We submit that the suggested symmetry fails in two respects. First, when a shipper seeks judicial review of a Commission order denying

[8] Shippers for whose benefit such orders are made and all other shippers similarly situated may sue thereon under section 16(2). See *Mitchell Coal Co.* v. *Penna. R.R. Co.,* 230 U.S. 247, 257; *Phillips* v. *Grand Trunk Ry.,* 236 U.S. 662, 665–66.

reparations, pursuant to the general provisions of Section 17(9) of the Interstate Commerce Act and 28 U.S.C. §§ 1336, 1398, he may (indeed, must) bring it in the district in which he resides—essentially the same venue advantage which Section 16(2) of the Interstate Commerce Act gives him in a suit to enforce a Commission order awarding reparations. Secondly, the venue and jurisdictional principles of *Pennsylvania R.R.* v. *United States, supra,* were abrogated by the Congress, with the support of the Judicial Conference of the United States, in Public Law No. 88–513, 78 Stat. 695, approved August 30, 1964 (subsequent to the decision below).

(c) Third, the court below considered it important *to permit* a railroad to invoke judicial review of a Commission order awarding reparations under 28 U.S.C. 1336, 1398, so as to assure "some symmetry in the construction and maintenance of a national transportation policy," on the theory that in such a suit "the United States and the ICC are parties. The Attorney General and the General Counsel of the Commission are directly and immediately responsible for the conduct of that litigation and the advocative assertion of contentions deemed essential in the public interest." The court below pointed out, in contrast, that "in the Shipper's § 16(2) suit neither the Commission nor the Government is a party" (App. 11a–12a). With all respect to the court below, we must point out the following facts: Most reparation orders hinge upon their own peculiar facts. See *United States* v. *I.C.C.,* 337 U.S. at 442. We cannot recall any

recent suit by a shipper under Section 16(2) in which the Department of Justice or the Commission found an occasion to intervene. In the converse situation where private shippers seek judicial review of Commission orders denying reparations, the Department of Justice has for some years followed the general policy of not taking an affirmative position by filing a neutral answer, as in the instant case. Moreover, the history of the present case suggests that one result of the decision below will be to permit the transfer of the burden of defending Commission orders awarding reparations from the shipper to the Commission's legal staff—regardless of whether there is involved any issue of general transportation importance.

Finally, the decision below conflicts with the prior holdings or statements by this Court that a shipper's suit under Section 16(2) is the exclusive route by which the Congress has authorized the courts to determine the validity of a Commission order awarding reparations.

In *United States* v. *I.C.C.*, 337 U.S. 426, the Supreme Court held that an order denying reparation was reviewable and that the proper forum was a one-judge district court. The Commission had not issued any reparation order within the meaning of section 16(2), and the Supreme Court carefully noted, "Had the Commission made an award to the Government it could have filed a civil suit to recover money damages under the provisions of 49 U.S.C. § 16(2)." (at 443). This Court then properly characterized the section 16(2) suit as the "one-judge trial and appeal

procedure available for enforcement of an award order," and went on to hold that such procedure "would appear to be an equally appropriate and adequate tribunal for adjudication of validity of a Commission order denying reparation." (*ibid.*) The dissenting justices concurred in the view that section 16 "affords judicial review when an award for damages is made" (at 457); but believed that the general review provisions did not apply to Commission orders denying relief.

In *Porter Co.* v. *Central Vermont Ry., Inc.*, 366 U.S. 272, the Supreme Court again adverted to the appropriate forum for enforcement and review of orders awarding reparations. The Commission had not then issued such an order, and the Court specifically refused to consider matters relating solely to reparations, holding that, "Such an order, when and if made, can be challenged before a single judge under 49 U.S.C. § 16(2)." (at 274, note 6).

In *Washington Terminal Co.* v. *Boswell,* 319 U.S. 732, this Court affirmed by an equally divided vote a decision written by Mr. Justice Rutledge under provisions of the Railway Labor Act which are closely analogous to section 16(2). Under section 3 First (p) of the Railway Labor Act, 45 U.S.C. § 153 First (p), an employee who has obtained an award of the National Railroad Adjustment Board may file suit in the district court for enforcement if the carrier does not comply with the agency order. In the *Boswell* case, 124 F. 2d 235, the Court of Appeals for the

District of Columbia held that a carrier may not maintain a suit for a declaratory judgment of rights during the period which the Labor Act allows for the employee's enforcement suit. In words equally applicable here, Mr. Justice Rutledge noted the "definite and special scheme" for determining the legality of an award and the "detailed plan for review" in an enforcement proceeding, both of which indicated "that the method of review provided was intended to be exclusive * * *. More especially there could have been no such reason for writing into the statute the unusual and highly important special advantages given to the employees seeking enforcement" (at 240). As Mr. Justice Rutledge stated, "Congress had no purpose to give the statutory advantages to the employees if he should beat his employer to the courthouse, but to take them away if he should come in second. That is true whether the employer's suit is one to restrain enforcement of the award, set it aside, declare it void, or reinterpret the original contract with the same effects upon the award." (124 F. 2d at 242). The Court expressly cited section 16(2) as an example of a similar enforcement suit (at 249–50 and note 32); and even the dissenting judge was of the view that there were more compelling considerations for viewing the section 16(2) suit to be the exclusive remedy than an enforcement suit under the Labor Act (at 271). We submit that the grounds stated by the court below in distinguishing *Boswell* cannot justify impairment of the procedural advantages which the Congress has accorded to shippers.

CONCLUSION

The issues presented by the decision below involve questions of judicial administration and administrative law affecting or potentially affecting many shippers and which should be settled by this Court. The decision below is in conflict with applicable decisions and principles laid down by this Court. It is urged that a writ of certiorari to review the judgment of the Court below be granted.

Respectfully submitted,

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OCTOBER 1964.

747-574—64——3

APPENDIX

In the United States Court of Appeals for the Fifth Circuit

No. 20485

INTERSTATE COMMERCE COMMISSION, APPELLANT

versus

ATLANTIC COAST LINE R. CO., ET AL., APPELLEES

Appeal from the United States District Court for the Middle District of Florida.

(July 8, 1964)

Before TUTTLE, Chief Judge, and POPE* and BROWN, Circuit Judges.

BROWN, Circuit Judge: The question in this case—arising for the first time in the 75-year operation of the Interstate Commerce Act—is whether a carrier may sue to set aside a reparation award of the Commission under § 16(1) by a suit under § 17(9), 28 USCA §§ 1336, 1398, 2321–23, or must confine its challenge as a defense in the Shipper's suit when,

* Of the Ninth Circuit, sitting by designation.

where and as brought under § 16(2). The District Court upheld the right. The ICC, joined by an array of shipper interests, spiritedly challenges the holding. We think the attack is unavailing and affirm.

The facts are very simple. In response to the complaint of the Shipper,[1] the ICC awarded reparations in the amount of $8,889.76 with interest, for unjust and unreasonable rates collected for phosphate movements from Florida to Illinois during the period April 10, 1945, to December 31, 1950.[2] The order called for payment on or before August 28, 1961, the effective date of compliance, *Missouri Pacific R.* v. *Austin,* 5 Cir., 1961, 292 F. 2d 415, 418–19. On September 6, 1961, the Carrier-appellees filed a suit in the Middle District of Florida, the venue district of Atlantic Coast Line to set aside the order. Long thereafter, on August 22, 1962, the Shipper filed suit against the Carrier and other railroads under § 16(2) in the Southern District of New York for the amount of the award with interest and, of considerable importance here, attorney's fees. The Court below overruled the ICC's motions to dismiss which asserted the exclusive method of review is under § 16(2). Thereafter, on the merits, it held the award and order invalid, primarily because of the statute of limitations. 213 F. Supp. 199.[3]

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[1] Thomson Phosphate Company.

[2] Thomson Phosphate Co. v. Atlantic Coast Line R.R., 1953, 291 ICC 1, 1954, 293 ICC 369, 1958, 303 ICC 25. Not surprisingly, one of the Carrier's defenses is that in this long span of years even an impersonal corporate person had [sic] expired.

[3] By an agreed statement of the case on appeal, F.R. Civ. P. 76, the appeal presents only the question of jurisdiction. No attack is made on the District Court's decision on the merits.

The ICC asserts that the sole review of an order granting reparations under § 16(1)[4] is that provided in § 16(2).[5] The Carrier, on the other hand, insists that § 17(9)[6] expressly authorizes "a suit to enforce,

[4] 49 USCA § 16(1):

"If, after hearing on a complaint made as provided in section 13 of this title, the commission shall determine that any party complainant is entitled to an award of damages under the provisions of this chapter for a violation thereof, the commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named."

[5] Section 16(2) of the Interstate Commerce Act, 49 USCA § 16(2) provides:

"If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the district court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any State court of general jurisdiction having jurisdiction of the parties, a complaint setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated, and except that the plaintiff shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the plaintiff shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit."

[6] 49 USCA § 17(9):

"(9) When an application for rehearing, reargument, or

enjoin, suspend, or set aside" an order, thus setting in train the jurisdictional-procedural provisions of 28 USCA §§ 1336,[7] 1398,[8] 2321,[9] 2322,[10] and 2323.[11]

The ICC's approach is a dual one. It contends, first, that construction of all of the statutes together

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reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or a board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise."

[7] 28 USCA § 1336:

"Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission."

[8] 28 USCA § 1398:

"Except as otherwise provided by law, any civil action to enforce, suspend or set aside in whole or in part an order of the Interstate Commerce Commission shall be brought only in the judicial district wherein is the residence or principal office of any of the parties bringing such action."

[9] 28 USCA § 2321:

"The procedure in the district courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission other than for the payment of money or the collection of fines, penalties and forfeitures, shall be as provided in this chapter.

"The orders, writs, and process of the District Courts may, in the cases specified in this section and in the cases and proceedings under sections 20, 23, and 43 of Title 49, run, be served, and be returnable anywhere in the United States."

manifests a congressional purpose to restrict review of a reparations award to the Shipper's suit under § 16(2). Next, both as a part of that argument, and independent of it, the ICC further asserts that there is no reviewable final "order" as called for in §§ 17 (9), 1336 or 1398.

These arguments stress the non-self-executing aspects of a reparation award. Since they are "for the payment of money," the Carrier is not bound to comply under the imminence of a mandatory injunction suit brought by the ICC or the United States. § 16 (12), 49 USCA § 12(12) [sic]. Emphasizing that § 16 (2) provides only that "the findings and order of the Commission shall be prima facie evidence of the facts therein stated," the ICC urges isolated excerpts from early opinions of the Supreme Court to suggest that it is really not an order at all. Thus *Mills* v. *Lehigh Valley R.R.*, 1915, 238 U.S. 473, 482, 35 S.Ct. 888, 59 L.Ed. 1414, had this to say of § 16(2): "The statutory provision merely established a rule of evidence. It

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[10] 28 USCA § 2322:

"All actions specified in section 2321 of this title shall be brought by or against the United States."

[11] 28 USCA § 2323:

"The Attorney General shall represent the Government in the actions specified in section 2321 of this title * * *.

"The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party. * * *."

leaves every opportunity to the * * * [Carrier] to contest the claim." [12]

But we have no doubt that this award has all of the characteristics of finality so far regarded as essential to court review under statutes comparable to those here involved. *Rochester Tel. Corp. v. United States,* 1939, 307 U.S. 125, 59 S. Ct. 754, 83 L. Ed. 1147; *Columbia Broadcasting System v. United States,* 1942, 316 U.S. 407, 62 S. Ct. 1194, 86 L. Ed. 1563; *Frozen Food Express v. United States,* 1956, 351 U.S. 40, 76 S. Ct. 568, 100 L. Ed. 910; *United States* v. *Storer Broadcasting Co.,* 1956, 351 U.S. 192, 76 S. Ct. 763, 100 L. Ed. 1081; *El Dorado Oil Works v. United*

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[12] At the same term the Court stated in Meeker & Co. v. Lehigh Valley R.R., 1915, 236 U.S. 412, 430, 35 S. Ct. 328, 59 L. Ed. 644: "This provision only establishes a rebuttable presumption. It cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury. At most therefore it is merely a rule of evidence. It does not abridge the right of trial by jury or take away any of its incidents."

Its sweeping assurance of a jury trial and "contestation of all the issues, * * * of fact" must now be read with considerable reservation. All acknowledge that under the doctrine of primary jurisdiction the § 16(2) court may not independently determine the merits of the unjustness or unreasonableness of rates, discriminatory practices, and the like. We may assume, without deciding, that review of such "administrative" matters subject to the expertise of the ICC in a § 16(2) suit is no less than in one under §§ 1336, 1398. It is clear that it is not greater. New Process Gear Corp. v. New York Central R.R., 2 Cir., 1957, 250 F. 2d 569, 572, cert. denied, 1958, 356 U.S. 959, 78 S. Ct. 996, 2 L. Ed. 2d 1066, citing United States v. ICC, 1949, 337 U.S. 426, 69 S. Ct. 1410, 93 L. Ed. 1451; Mitchell Coal & Coke Co. v. Pennsylvania R.R., 1913, 230 U.S. 247, 33 S. Ct. 916, 57 L. Ed. 1472: Glens Falls Portland C. Co. v. Delaware & Hudson Co., 2 Cir., 1933, 66 F. 2d 490, cert. denied, 1933, 290 U.S. 697, 54 S. Ct. 132, 78 L. Ed. 599.

States, 1946, 328 U.S. 12, 66 S. Ct. 843, 90 L. Ed. 1053. An award-order is, first, administratively final. Nothing further remains to be done by the ICC. It is not a declaration of consequences dependent on further, future action. Rather, it is positive and presently operative. It declares, first, the violation of the Act (unreasonable, unjust rates, and the like) and then finds the amount of the Shipper's claim. On the two findings, it directs the payment of the award. And as *United States v. ICC,* 1949, 337 U.S. 426, 432–33, 69 S. Ct. 1410, 93 L. Ed. 1451, and *Pennsylvania R.R. v. United States,* 1960, 363 U.S. 202, 205, 80 S. Ct. 1131, 4 L. Ed. 2d 1165, made clear, finality for the purposes of review is not to be determined solely by the terms of the order, but by whether such order "if upheld" forecloses a right or imposes an obligation. Assuming that a § 16(2) suit is necessary for the Shipper to coerce payment, the resulting court judgment is to "uphold" the award, to hold it valid. In that judicial result, the administrative proceedings have not in any sense been superseded. The critical finding of violation of the Act as an essential ingredient to recovery rests wholly and entirely upon the administrative decision of the ICC, not independent court determination, since recovery by the Shipper assumes that the primary jurisdiction aspect has withstood the restricted review, see note 12, *supra.*

Bearing in mind that the problem here is the determination of the statutory mechanism for review in reparation award order cases generally, not merely the machinery which would satisfy this particular case, we perceive additional factors giving final operative effect to the award-order no matter what happened in the Shipper's § 16(2) suit.

An award-order is in two parts, (1) the determination of violation of statutory policies, unjust, unreasonable rates, discriminatory practices, or the like, and (2) specific damage to the shipper-complainants. So long as element (1) is outstanding and not set aside, it affords the basis for a § 9 suit, 49 USCA § 9, by a shipper similarly situated without his first going through a reparation proceeding. And in *Phillips* v. *Grand Trunk W. Ry.*, 1915, 236 U.S. 662, 35 S. Ct. 444, 59 L. Ed. 774, and many others, the Court has held that a person not a party complainant to a proceeding before the ICC may, on the general finding that the rate was unjust and unreasonable, bring his independent suit in court. Of the administrative finding that the rates were unjust and unreasonable, the Court said the "finding * * * was general in its operation and inured to the benefit of every person that had been obliged to pay the unjust rate. Otherwise those who filed the complaint or intervened during the [Commission] hearing, would have secured an advantage over the general body of the public, with the result that the order of the Commission would have created a preference in favor of the parties to the record and would have destroyed the very uniformity which that body had been organized to secure." 236 U.S. 662, at 665. In addition, there is a substantial indication that in the day-to-day operations of the ICC in the fabrication and building of its own formidable body of transportation law, reparation order-awards announcing principles are regarded as precedents. Thus the opinion reports of the ICC here, note 2, *supra*, until set aside by a direct proceeding, remain outstanding precedents on the question of the statute of limitation notwithstanding the possibility that in the § 16(2) suit in the Southern District of

New York a jury might bring in a verdict for the Carrier. Even 100% success in the § 16(2) suit leaves the Carrier faced with unsatisfactory law for all to use and unsatisfactory fact findings for all shippers to use.

Symmetry also suggests a congressional purpose to allow review of an award-order granting reparations under § 17(9). It is unquestioned that if the Commission denies the Shipper's reparation complaint, review may properly be had under §§ 1336, 1338. *Cf. United States* v. *ICC,* 1949, 337 U.S. 426, 69 S. Ct. 1410, 93 L. Ed. 1451. And in a § 9 suit, 49 USCA § 9, the administrative determination of primary jurisdiction elements on a referral to the ICC by a Court is reviewable under §§ 17(9), 1336, 1398. *Pennsylvania R.R.* v. *United States,* 1960, 363 U.S. 202, 80 S. Ct. 1131, 4 L. Ed. 2d 1165.

Against this massive structure of injunctive reviewability, the Commission's thesis comes down to the assertion that Congress meant to allow court review of the grant of an award-order granting reparation only in the shipper's § 16(2) suit. In so doing, stress is laid on the procedural advantages given the shipper—(1) freedom from court costs, (2) attorney's fees if successful, (3) choice of venue, and (4) relief from the burden of making out a prima facie case by introducing in evidence the administrative findings and order. Urged as a fitting, railroad analogy is the statutory mechanism for awards under the Railway Labor Act, 45 USCA §§ 151, 153 First (p). Under this provision, an employee who has obtained an award of the National Railroad Adjustment Board may file suit in the District Court for enforcement if the carrier does not comply with the agency order.

The order is prima facie evidence of the facts therein stated. In *New Orleans Public Belt R. Commission* v. *Ward,* 5 Cir., 1950, 182 F. 2d 654, following *Washington Terminal Co.* v. *Boswell,* D.C. Cir., 1941, 124 F. 2d 235, affirmed by an equally divided court, 1943, 319 U.S. 732, 63 S. Ct. 1430, 87 L. Ed. 1694, we held that a carrier could not circumvent this statutory rights of the employee by resorting to a declaratory judgment suit.

We think the resemblance is superficial. We would think also that to import into the highly specialized aspects of carrier regulation and the statutory scheme of determination and review especially contrived for it, the cumbersome and frequently difficult distinctions between major and minor, between court decision and Adjustment Board decision, between Adjustment Board and Mediation Board, between Court and Mediation Board will hinder, not help, in achieving judicial review which is clearly guaranteed under the Administrative Procedure Act. 5 USCA §§ 1009, 1001 (d), (f), and (g).

Many reasons may be briefly summarized. The actions of the Railway Adjustment Board are not subject to the Administrative Procedure Act. The provision of 45 USCA § 153 First (p) expressly invests the Court with power to "enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the * * * Board." At the same time there is no other statutory grant of review as in § 17(9). An Adjustment Board proceeding resulting in a money award carries forward no elements of primary jurisdiction with limited, restricted judicial review. Such an award is open for full review. *Hodges* v. *Atlantic Coast Line R.R.,* 5

Cir., 1962, 310 F. 2d 438. Probably most important, that structure is hardly a model to be copied.[13]

The procedure invoked by the Carrier here is fair and efficient. Brought in the same single Judge District Court[14] in which the Shipper's complaint would be filed complaining of a denial of a § 16(1) reparation award or to review an unsatisfactory finding in a court referral proceeding upon which to base a § 9 suit, there may be a determination once and for all of the underlying validity of the Commission's findings with respect to violations of the Act (unjust, unreasonable rates, discriminatory practices, etc.) If the order *vis-a-vis* the ICC and the Carrier fails to pass muster and is therefore "not in accordance with law," 5 USCA § 1009(e), it may then be set aside. No one, whether Carrier or Shipper, will thereafter be subjected to the expense of useless litigation in numerous courts where separate § 16(2) shipper suits have been filed.

More important, this assures some symmetry in the construction and maintenance of a national transportation policy. In the injunction suit, §§ 17(9), 1336, 1398, the United States and the ICC are parties. The Attorney General and the General Counsel of the Commission are directly and immediately responsible for

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[13] The dissenting opinions in Pennsylvania R.R. v. Day, 1959, 360 U.S. 548, 554, 79 S. Ct. 1322, 3 L. Ed. 2d 1422; Union Pacific R.R. v. Price, 1959, 360 U.S. 601, 617, 79 S. Ct. 1351, 3 L. Ed. 2d 1460, pointing up serious constitutional questions emphasize what they describe as the one-sided nature of judicial review: the employee loses, he has no right of review whatsoever; the employee wins, the carrier loses, the carrier has unlimited review on facts and law.

[14] United States v. ICC, 1949, 337 U.S. 426, 69 S. Ct. 1410, 93 L. Ed. 1451; Pennsylvania R.R. v. United States, 1960, 363 U.S. 202, 80 S. Ct. 1131, 4 L. Ed. 2d 1165.

the conduct of that litigation and the advocative assertion of contentions deemed essential in the public interest. This is all the more essential where, as is quite frequent, there is an outright clash between the executive departments of the Government, the Attorney General, and the Commission. See *United States* v. *ICC,* 1949, 337 U.S. 426, 69 S. Ct. 1410, 93 L. Ed. 1451. In contrast, of course, in the Shipper's § 16(2) suit neither the Commission nor the Government is a party. Intervention, whether permissive or as a matter of right, is something less than satisfactory especially with the pendency of a number of shipper suits in a number of jurisdictions. Without intervention, the sole spokesman in behalf of the ICC's order is the private party seeking partisan relief opposed by formidable, experienced, competent counsel for the Carrier.

We cannot believe that these important considerations were derailed by Congress out of its statutory desire to accord to a Shipper some procedural benefits. Indeed, with respect to the element of shipper damage, it is entirely too soon to state that a Shipper may not under appropriate circumstances obtain the benefit of all, or a part, of these statutory advantages by intervening in the injunction proceeding. And considering the great flexibility open to an equity court, the conclusion reached here that an injunction suit may be maintained by the Carrier does not force that Court to take on the adjudication of all of the damage element claims of numerous shippers. Wide latitude would be allowed to fashion appropriate, preliminary machinery by which shipper suits could be filed in appropriate venue districts and stayed pending ultimate determination of the injunction proceeding. A decree sustaining basic validity would likely

leave for the individual § 16(2) suits only the limited issue of money damage, presumably a relatively simple matter for court or jury determination with the Shipper armed, as he is, with the working presumption from the prima facie case.

The District Court was, therefore, correct in overruling the motion to dismiss, in sustaining the right of judicial review in that Court under §§ 1336, 1398, and in rejecting the contention that review had to be in the § 16(2) suit pending in New York.[15]

AFFIRMED.

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[15] The ICC's contention that the trial court, having jurisdiction, should nevertheless have declined to exercise it for equitable considerations is without merit.

In the United States Court of Appeals for the Fifth Circuit

OCTOBER TERM, 1963

No. 20485

D.C. Docket No. 4771—Civil-J

INTERSTATE COMMERCE COMMISSION, APPELLANT

versus

ATLANTIC COAST LINE R. CO., ET AL., APPELLEES

Appeal from the United States District Court for the Middle District of Florida

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Before TUTTLE, Chief Judge, and POPE* and BROWN, Circuit Judges

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

July 8, 1964.

Issued as Mandate:

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*Of the Ninth Circuit, sitting by designation.

RELEVANT PORTIONS OF STATUTES INVOLVED

Section 16(2) of the Interstate Commerce Act, 49 U.S.C. § 16(2), provides:

> If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the district court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any State court of general jurisdiction having jurisdiction of the parties, a complaint setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated, and except that the plaintiff shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the plaintiff shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.

Section 17(9) of the Act, 49 U.S.C. § 17(9), provides:

> When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or a board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, sus-

> pend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise.

Section 1336 of the Judicial Code, 28 U.S.C. § 1336, provides:

> Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission.

Section 1398 of the Judicial Code, 28 U.S.C. § 1398, provides:

> Except as otherwise provided by law, any civil action to enforce, suspend or set aside in whole or in part an order of the Interstate Commerce Commission shall be brought only in the judicial district wherein is the residence or principal office of any of the parties bringing such action.

Section 3 First (p) of the Railway Labor Act, 45 U.S.C. § 153 First (p), provides:

> (p) If a carrier does not comply with an order of a division of the [National Railroad] Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the District in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the

division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. [redacted] 14

INTERSTATE COMMERCE COMMISSION, *Petitioner*

v.

ATLANTIC COAST LINE R. CO., ILLINOIS CENTRAL R. CO., CHICAGO & EASTERN ILLINOIS R. CO., THE BALTIMORE & OHIO R. CO., CHICAGO, BURLINGTON & QUINCY R. CO., CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC R. CO., GULF, MOBILE & OHIO R. CO., THE NEW YORK CENTRAL R. CO., WABASH RAILROAD CO., *Respondents*

BRIEF OF THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE AS AMICUS CURIAE IN SUPPORT OF THE GRANT OF THE PETITION OF THE INTERSTATE COMMERCE COMMISSION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

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OCTOBER TERM, 1964

No.

INTERSTATE COMMERCE COMMISSION, *Petitioner*

v.

ATLANTIC COAST LINE R. CO., ILLINOIS CENTRAL R. CO., CHICAGO & EASTERN ILLINOIS R. CO., THE BALTIMORE & OHIO R. CO., CHICAGO, BURLINGTON & QUINCY R. CO., CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC R. CO., GULF, MOBILE & OHIO R. CO., THE NEW YORK CENTRAL R. CO., WABASH RAILROAD CO., *Respondents*

BRIEF OF THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE AS AMICUS CURIAE IN SUPPORT OF THE GRANT OF THE PETITION OF THE INTERSTATE COMMERCE COMMISSION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Under date of October 20, 1964, the Interstate Commerce Commission filed a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered July 8, 1964 in *I.C.C.* v. *Atlantic Coast Line R. Co.*, 334 F. 2d

46. The judgment affirmed the judgment of the United States District Court for the Middle District of Florida, entered January 9, 1963, in *Atlantic Coast Line Railroad Co.* v. *United States,* 213 F. Supp. 19 (1963). The text of both of said decisions is set forth in the Appendix to the I.C.C. petition. The National Industrial Traffic League files this brief as amicus curiae in support of the granting of the foregoing petition of the Interstate Commerce Commission herein.

INTEREST OF THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE IN THE ISSUES HERE INVOLVED

The National Industrial Traffic League (hereinafter sometimes referred to as the League) is a voluntary organization of shippers and associations of shippers throughout the United States. The League's members account for a very substantial portion of the traffic transported annually by railroads and other modes of transportation throughout the United States. The League's membership runs the entire gamut of the American shipping public, including large numbers of small and medium size industrial and commercial companies. The members of the League as shippers pay and bear the freight rates and charges of the railroads they employ in providing transportation service.

Unless reversed, the decision and judgment of the Court below will produce a drastic and disadvantageous change in the procedure whereby shippers—and particularly smaller-sized shippers—may obtain reparations when the railroads have exacted unlawful freight rates and charges for transportation service. In practical effect, obdurate and litigious railroads, under the decision of the Court below, will be in a position to deny many shippers, especially smaller-sized

shippers, any effective remedy for reparations for the exaction of unlawful freight rates and charges.

The League, pursuant to permission of the Fifth Circuit, filed a brief as *amicus curiae* with the court below. Consents to the filing by the League of this brief as *amicus curiae,* executed by counsel for the various parties, are being filed simultaneously with this brief.

The League adopts as its own the representations of the I.C.C. in its petition as to Jurisdiction (page 2), Questions Presented (page 2), Statutes Involved (page 3) and Statement Of The Case (pages 3 to 5). The League also adopts the I.C.C. representations as to Reasons For Granting The Writ (pages 5 to 14), but desires as *amicus curiae* to supplement the latter as set forth below.

ARGUMENT

The National Industrial Traffic League submits (1) that the instant case presents issues of tremendous importance to the shipping public; (2) that the practical effect of the decision of the court below is to render Section 16(2) of the Interstate Commerce Act in large part a nullity; (3) that the decision and judgment below are erroneous as a matter of law.

As this court has had reason to observe on many occasions, one of the primary purposes of the Congress in passing the Interstate Commerce Act, and the amendments thereto, is to protect the members of the shipping public from unlawful abuses perpetrated by powerful, far-flung railroads on which shippers depend in such large measure for transportation service. Shippers are particularly at the mercy of arbitrary railroads in the matter of unlawful rates. Requiring the

transportation service to move their traffic, shippers must pay railroad freight invoices within 96 and 120 hours, under penalty of law.*

Congress has been very specific in affording shippers a feasible method, with minimum burden of expense, whereby they may obtain reparations. This was accomplished by the enactment of Section 16(2) of the Interstate Commerce Act, 49 U.S.C. 16(2), set forth in Appendix A hereof.

Congress clearly endeavored to counter-balance the scales when a shipper obtains a reparations order and the railroads decline or refuse to pay. For example, Congress conferred upon the shipper considerable flexibility as to the forum he can use. The shipper can sue in the U. S. District Court in which he resides, or in which is located the principal operating office of the railroad, or through which the road of the carrier runs. In its concern for shippers as they seek relief against powerful railroads Congress went even further. It also made available to the shipper the forum of any state court of general jurisdiction having jurisdiction of the parties. Further, the findings and order of the Commission are to be *prima facie* evidence of the facts therein stated. If the shipper ultimately prevails, under Section 16(2) Congress has also provided that the shipper shall be allowed a reasonable attorney's fee, to be taxed and collected as part of the suit.

These are substantial advantages intentionally and deliberately made available to shippers by the Congress under Section 16(2) of the Interstate Commerce Act. See *Meeker & Co.* v. *Lehigh Valley R. R.*, 236

* See 49 Code of Federal Regulations 142.1 b.

U. S. 412 (1915) at page 433; *Baldwin* v. *Milling Co.*, 307 U. S. 478 (1939) at pages 481-483.

By virtue of Section 16(2) shippers who have received a reparation award from the Commission, which the carriers can refuse to pay, have had a feasible avenue of relief of tremendous importance, especially when the award is a modest one or when the financial resources of the shipper to pursue litigation are limited regardless of the size of the reparation award.

In one fell swoop the decision of the court below would, in practical effect, eviscerate these protective provisions of Section 16(2) of the Interstate Commerce Act. Under that decision, the railroads are enabled to rush to a courthouse of their own selection and effectively prevent the shipper from taking steps under Section 16(2). In the very case now before this Court the effort of the shipper to avail itself of its remedy under Section 16(2) has thus far come to naught, and will come to naught if the decision below is allowed to stand.

Of what use are the remedies under Section 16(2) to a small shipper in New York if the railroads can institute suit in Florida attacking the reparation award the shipper obtained from the I.C.C., before the shipper even determines upon the forum he will use? Indeed, while the shipper is still hoping and expecting that the railroads will acquiesce in the I.C.C. reparation award, so that he is not even thinking of suing pursuant to Section 16(2), the railroad defendants can select the forum of maximum inconvenience to the shipper, bring suit against the I.C.C., not the shipper, and hope the shipper will abandon his claim, in view of the financial

expenditures such litigation will entail for the shipper. Under such circumstances the Section 16(2) remedy for shippers so carefully fashioned by Congress would become a snare and an illusion.

The loss to shippers of the substantial benefits of Section 16(2), under the interpretation of the court below, would be an unmitigated disaster for the shippers of the United States. They will be left to the whim of the powerful railroads, with their far-flung operations and sizeable legal staffs who will pick and choose the forums. One may be sure, such forums will involve maximum expense and inconvenience to shippers.

Such a result makes a mockery of the effort of Congress to delineate the manner in which orders awarding reparations to shippers shall come before the courts.

The court below relies upon 28 U. S. Code 1336, 1398, 2321 and Section 17(9) of the Interstate Commerce Act. These are set forth in Appendix A hereto. 28 U.S.C. 2321 explicitly contains the excluding words ". . . any order of the Interstate Commerce Commission other than for the payment of money . . ." 28 U.S.C. 1336 commences with the clause "Except as otherwise provided by Act of Congress . . . ." 28 U.S.C. 1398 expressly begins: "Except as otherwise provided by law . . ."

The League submits that the quoted excluding and excepting clauses refer to provisions such as Section 16(2). These clauses point necessarily to the opposite conclusion to that reached by the Court below. This is all the more so when, as we have seen, the interpretation of the Court below will render Section 16(2) a pious platitude and little more.

The reliance of the court below upon Section 17(9) of the Interstate Commerce Act is also without warrant. It has always been recognized by the Court that only an order which is "final" in nature is reviewable. *Missouri, Pacific & Express, Inc.* v. *United States,* 165 F. Supp. 677 (D.C. Ky. 1958); *Michigan Public Service Commission* v. *United States,* 162 F. Supp. 670 (D.C. Michigan 1958); *Carolina Scenic Stages* v. *United States,* 202 F. Supp. 919 (D.C. S.C. 1962); *Malone Freight Lines, Inc.* v. *United States,* 204 F. Supp. 745 (D.C. Alabama 1962); *AEC Lines, Inc.* v. *United States,* 197 F. Supp. 591 (D.C. Iowa 1960).

By the explicit terms of Section 16(2) a reparation order of the Interstate Commerce Commission is not such a final order. It is "prima facie evidence", and nothing more, by precise definition in the statute. Professor Sharfman, one of the leading authorities on the Interstate Commerce Act, in his monumental treatise, noted that a reparation order is ". . . not legally binding upon the carrier." See *Sharfman, Interstate Commerce Commission, a Study in Administrative Law and Procedure,* Part III-B, Page 330 (1936). The Commission's reparation order merely forms *prima facie* evidence of the matters therein stated at the separate court action. *Morgan Co.* v. *Great Northern Ry. Co.,* 285 Fed. 876, 878 (7th Circuit, 1923); *Meeker & Co.* v. *Lehigh Valley R. R.,* 236 U. S. 412, 439 (1915); *Mills* v. *Lehigh Valley R.R.,* 238 U. S. 473, 482 (1915); *Pennsylvania R.R.* v. *Jacoby & Co.,* 242 U. S. 89, 94 (1916); *Spiller* v. *A.T. & S. F. Ry.,* 253 U. S. 117, 131 (1920); *Pennsylvania R. R.* v. *Weber,* 257 U. S. 85, 90 (1921).

Orders of the Interstate Commerce Commission are not subject to judicial review if they do not command carriers to do or refrain from doing anything, grant or withhold any authority, privilege, or license, extend or enlarge any power or facility, subject carrier to any liability, civil or criminal, change carriers' existing or future status or condition, or determine any right or obligation. *Motor Freight Express, Inc.* v. *United States,* 60 F. Supp. 238 (D.C. Pennsylvania 1945). In the case at hand, the so-called "order" of the Commission did not subject the carrier to any civil or criminal liability or otherwise meet the foregoing requirements. While the order entered by the Commission "authorized and directed" the carrier to pay reparation to the shipper, such an order is not itself enforceable.

The court below makes much of "the statutory scheme" and "symmetry". The National Industrial Traffic League submits that the Congress in its wisdom enacted Section 16(2) for the protection of shippers in their up-hill, uneven struggle when in dispute with the powerful railroads of the nation. The decision of the court below will reduce the carefully constructed statutory scheme for the assistance of shippers to a shambles, and leave countless shippers throughout the country without an effective remedy for recovering, through reparations, freight rates and changes unlawfully exacted. Shippers and railroads have functioned well under the provisions of Section 16(2) for many decades with no serious disturbance to the "symmetry" mentioned by the court below. In effect the court below would repeal the protective provisions of Section 16(2) by judicial fiat, to the serious and substantial detriment of the shippers of this nation.

CONCLUSION

The National Industrial Traffic League as amicus curiae submits that the instant case involves issues of far-reaching importance to the shippers of the United States, and of vital significance to the administration of the Interstate Commerce Act. The decision of the court below is in flagrant conflict with the governing statutes and with the principles pertaining thereto promulgated by the federal courts, including this Court. It is urged that a writ of certiorari to review the judgment of the court below be granted.

Respectfully submitted,

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October 28, 1964

APPENDIX A

Relevant Portions of Statutes Involved

Section 16(2) of the Interstate Commerce Act, 49 U.S.C. § 16(2), provides:

> If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the district court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any State court of general jurisdiction having jurisdiction of the parties, a complaint setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated, and except that the plaintiff shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the plaintiff shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.

Section 17(9) of the Act, 49 U.S.C. § 17(9), provides:

> When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or a board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, suspend, or

set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise.

Section 1336 of the Judicial Code, 28 U.S.C. § 1336, provides:

> Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission.

Section 1398 of the Judicial Code, 28 U.S.C. § 1398, provides:

> Except as otherwise provided by law, any civil action to enforce, suspend or set aside in whole or in part an order of the Interstate Commerce Commission shall be brought only in the judicial district wherein is the residence or principal office of any of the parties bringing such action.

Section 2321 of the Judicial Code, 28 U.S.C.A. § 2321, provides:

> The procedure in the district courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission other than for the payment of money or the collection of fines, penalties and forfeitures, shall be as provided in this chapter.
>
> The orders, writs, and process of the district courts, may, in the cases specified in this section and in the cases and proceedings under sections 20, 23 and 43 of Title 49, run, be served, and be returnable anywhere in the United States.

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 606

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

ATLANTIC COAST LINE R. CO., ILLINOIS CENTRAL R. CO., CHICAGO & EASTERN ILLINOIS R. CO., THE BALTIMORE & OHIO R. CO., CHICAGO, BURLINGTON & QUINCY R. CO., CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC R. CO., GULF, MOBILE & OHIO R. CO., THE NEW YORK CENTRAL R. CO., WABASH RAILROAD CO.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

The Solicitor General, on behalf of the United States, supports the petition for a writ of certiorari filed by the Interstate Commerce Commission. While nominally a defendant in the district court, the United States did not participate in

that proceeding and did not seek review in the court of appeals. Accordingly, it has no standing to petition in its own right. However, the government has a substantial interest in the issue here tendered, since it would be a statutory defendant in any action instituted by a carrier to set aside a reparations order of the Commission. 28 U.S.C. 2322. See *United States* v. *Interstate Commerce Commission*, 337 U.S. 426.

The issue presented—whether a rail carrier may bring suit against the Commission and the United States under Section 17(9) of the Act (49 U.S.C. 17 (9)) and Section 1336 of the Judicial Code (28 U.S.C. 1336) to set aside an order awarding reparations to a shipper—is of considerable importance to the Commission, to the carriers, and, above all, to the shipping community. Until this case was decided, it had generally been assumed by the carriers, as well as by the Commission, that the exclusive procedure for reviewing a reparations award was a suit for damages brought by a shipper under Section 16(2) of the Act (49 U.S.C. 16(2)). This is the first case to challenge that assumption, although several other carrier suits attacking reparations orders are now pending in the district courts. *Central Vermont Railway, Inc., et al.* v. *U. S. and ICC, Civ. 4010*, D. Vt.; *Atlantic Coast Line R. Co., et al.* v. *U.S. and ICC*, Civ. 63-145-Civ-J., M.D. Fla.; *The B&O R. Co., et al.* v. *U. S. and ICC*, Civ. 15279, D. Md.

The decision below may seriously impair the ability of some shippers to recover reparations awarded them by the Commission. If the carriers are free to bring actions such as this, shippers will almost in-

variably be denied the benefits available to them under Section 16(2) (*e.g.*, reimbursement of costs and, if successful, attorney's fees). For while the shipper may commence his action only after the carrier has refused to comply with the Commission's order, the carrier may take action to set aside the order even before the deadline for compliance has arrived. Thus, under the decision below, shippers who are not content to rely upon the Commission for the protection of their interests may be put to the burden of defending their awards in distant forums, often at a cost disproportionate to the relatively small amount at stake.

There is also serious doubt whether the decision below—one which would involve the Commission in nearly all litigation arising out of reparations awards —is consistent with the Congressional policy reflected in Section 16(12) of the Act (withholding from the Commission authority to bring suits to enforce orders "for the payment of money") and 28 U.S.C. 2321 (making the three-judge court provisions inapplicable to orders "for the payment of money"). The premise of those provisions appears to be that controversies growing out of reparations orders are unlikely to involve issues of sufficient public importance to justify the use of the three-judge procedure or to require the participation of the Interstate Commerce Commission, and that such disputes should be resolved by the interested private parties before single-judge courts. See *United States* v. *Interstate Commerce Commission*, *supra*, at 442-443.

Without attempting to elaborate upon the merits, we respectfully submit that the issue presented warrants review by this Court and that the petition should accordingly be granted.

ARCHIBALD COX,
Solicitor General.

NOVEMBER 1964.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. [redacted] 14

INTERSTATE COMMERCE COMMISSION,

Petitioner,

v.

ATLANTIC COAST LINE R. CO., ILLINOIS CENTRAL R. CO., CHICAGO & EASTERN ILLINOIS R. CO., THE BALTIMORE & OHIO R. CO., CHICAGO, BURLINGTON & QUINCY R. CO., CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC R. CO., GULF, MOBILE & OHIO R. CO., THE NEW YORK CENTRAL R. CO., WABASH RAILROAD CO.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 606

INTERSTATE COMMERCE COMMISSION,

Petitioner,

v.

ATLANTIC COAST LINE R. CO., ILLINOIS CENTRAL R. CO., CHICAGO & EASTERN ILLINOIS R. CO., THE BALTIMORE & OHIO R. CO., CHICAGO, BURLINGTON & QUINCY R. CO., CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC R. CO., GULF, MOBILE & OHIO R. CO., THE NEW YORK CENTRAL R. CO., WABASH RAILROAD CO.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

Opinions Below

The opinion of the United States District Court for the Middle District of Florida is reported at 213 F. Supp. 199, and is reproduced in the printed record (R. 28-37).

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 334 F. 2d 46, and is reproduced in the petition (Appendix 1a-13a).

Question Presented

Do district courts have jurisdiction under Section 17(9) of the Interstate Commerce Act, 49 U.S.C. § 17(9), and Sections 1336 and 1398 of the Judiciary and Judicial Procedure, 28 U.S.C. §§ 1336 and 1398, of suits by railroads to set aside the administrative and quasi-judicial findings of the Interstate Commerce Commission and reparation award-orders based thereon? Or must such suits be dismissed on the ground that the findings and orders must be challenged as a defense in shippers' suits under Section 16(2) of the Interstate Commerce Act, 49 U.S.C. § 16(2) if, as, when, and where brought?

Statutes Involved

The provisions of the statutes pertinent to this proceeding are Sections 16(2) and 17(9) of the Interstate Commerce Act 49, U.S.C. § 16(2) and § 17(9); Sections 1336 and 1398 of Judiciary and Judicial Procedure, 28 U.S.C. § 1336 and § 1398, and Sections 1001 (d), (f), and (g), and 1009(a) of the Administrative Procedure Act 5 U.S.C. § 1001(d), (f), and (g), and § 1009(a).

The first four of these provisions are printed in the petition (15a-16a). The provisions of the Administrative Procedure Act referred to are set forth in the appendix hereof (1b).

Statement of the Case

In *Thomson Phosphate Co.* v. *Atlantic Coast Line R. Co.*, 303 I.C.C. 25, and 311 I.C.C. 315 (R. 6-19), the Interstate Commerce Commission found the rates assessed on more than 600 carload shipments of phosphate rock from Prairie, Fla., to destinations in Illinois during the period from April 10, 1945, to December 31, 1950, unjust and unreason-

able, and awarded reparation aggregating $8,889.76, with interest. By orders of the Commission the railroads were "authorized and directed" to pay the reparation on or before August 28, 1961.

By complaint filed September 6, 1961 (R. 20-25) the respondents brought suit against the United States of America and the Interstate Commerce Commission in the United States District Court for the Middle District of Florida under the provisions of Section 17(9) of the Interstate Commerce Act, 49 U.S.C. § 17(9) and Sections 1336 and 1398 of Judiciary and Judicial Procedure, 28 U.S.C. §§ 1336 and 1398, to enjoin, set aside and annul the administrative and quasi-judicial findings of the Commission in the aforesaid proceedings, as well as the award-order based thereon. Among other things, the complaint alleged that the Commission erred in failing to find the proceeding before it barred by the statute of limitations of the Interstate Commerce Act, 49 U.S.C. § 16(3), in failing to observe and properly apply its own rules of practice, and in allowing prosecution of a complaint seeking damages by a corporation which had been dissolved five years previously.

By answer filed on January 5, 1962, the petitioner admitted, without qualification, all of the jurisdictional allegations of the complaint. However, on April 20, 1962, the petitioner moved the court to dismiss the complaint "for lack of jurisdiction of the subject matter, or in the exercise of its equity discretion".

By answer made on or about January 12, 1962, the United States of America neither defended nor opposed the Commission orders, pointing out that "the Interstate Commerce Commission and the shipper have adequate statutory authority to defend the Commission's orders", that the Commission "will avail itself of the statutory authorization to interpose all defenses to the plaintiffs' charges possible of being interposed", and that "the

shipper, if it so elects, may present its position through its own counsel".

The District Court denied the petitioner's motion to dismiss on May 15, 1962 (R. 26).

On August 22, 1962, a suit was filed on behalf of the Thomson Phosphate Company in the United States District Court for the Southern District of New York, seeking damages based on the orders of the Commission heretofore referred to. By stipulation of the parties, that complaint is being held in abeyance pending final disposition of the instant proceeding.

On January 9, 1963, the Florida District Court found the reports and orders of the Commission unlawful and set them aside (R. 27-37).

The petitioner appealed from the judgment of the District Court. It did not appeal the findings of the District Court on the merits, but only the question of the court's jurisdiction (R. 4).

On July 8, 1964, the United States Court of Appeals for the Fifth Circuit affirmed the decision and judgment of the District Court, holding that the District Court was correct in overruling the motion to dismiss, in sustaining the right of judicial review in that court under §§ 1336 and 1398, and in rejecting the contention that review had to be in the pending New York action. The Court of Appeals also concluded that the contention that the trial Court having jurisdiction should nevertheless have declined to exercise it for equitable considerations was without merit.

Argument

As the Court of Appeals quite properly indicated (7a), this case is important because of the necessity to determine "the statutory mechanism for review in reparation award order cases generally, not merely the machinery which

would satisfy this particular case". It is essential, therefore, that the nature and effect of administrative findings and reparation award orders based thereon be clearly defined.

In *Mitchell Coal Co.* v. *Penna. R. R. Co.*, 230 U. S. 247, one of the leading cases on the primary jurisdiction of the Commission, this Court made it abundantly clear that there are two separate and distinct aspects to a reparation award. The first is the finding that the assailed rates and charges are unlawful in violation of the Interstate Commerce Act, and the second is the finding as to the fact and the amount of damage. The Court characterized (p. 258) the first as an administrative finding, and the second as a quasi-judicial finding. The Court said that in a suit by a shipper for damages under § 16(2) the administrative finding of unlawfulness is "conclusive", that the quasi-judicial finding of the fact and amount of damage is only *prima facie* correct, and that only as to the latter finding does the carrier have "its day in court and the right to a judicial hearing". In short, the *Mitchell Coal* case holds that the carrier may not have a judicial hearing under § 16(2) on the administrative finding of unlawfulness, that finding being conclusive and binding upon carriers, unless and until it is set aside by the Commission itself, or by a court of competent jurisdiction.

Moreover, as the Court said in that case, award orders "can be given general and uniform operation since all shippers who have been or may be affected by the rate can take advantage of the ruling and avail themselves of the reparation order". Thus, under Section 9 of the Interstate Commerce Act, 49 U.S.C. § 9, so long as an administrative finding of unlawfulness is outstanding and not enjoined, suspended or set aside, every other shipper similarly situated is entitled by appropriate proceedings before the Commission or the courts to obtain the benefit of that general finding and order. *Phillips* v. *Grand Trunk Ry.*, 236 U. S. 662.

The Court of Appeals recognized the significance of the dual nature of award orders and the settled law with respect to the general effect of such award orders (8a).

I

The decision below is clearly correct.

The jurisdiction of the District Court was the only issue raised on appeal. Prior decisions by this Court make it clear that the decision below was correct.

A. The District Court had jurisdiction under Section 17(9) of the Interstate Commerce Act and Sections 1336 and 1398 of the Judiciary and Judicial Procedure.

Section 17(9) of the Interstate Commerce Act, 49 U.S.C. § 17(9)),* provides that when a petition for reconsideration of a decision, order, or requirement of the Commission shall have been made and denied or otherwise disposed of, a suit to enjoin, suspend or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under the provisions of law applicable to such suits, *but not otherwise.* There is nothing in the language of that section which excludes from its provisions orders of the kind here assailed. On the contrary, the language of that section specifically authorizes the filing of suits to enjoin, suspend, or set aside *any* decision, order, or requirement of the Commission.

Section 1336 of Judiciary and Judicial Procedure, 28 U.S.C. § 1336,* expressly gives the district courts jurisdiction of such actions, and § 1398 thereof* expressly fixes the venue of such actions as the judicial district wherein

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* Sometimes hereinafter referred to simply as § 17(9), § 1336 and § 1398 or §§ 17(9), 1336 and 1398.

is the residence or principal office of any of the parties bringing such action.

This Court has already decided that findings and orders relating to money damages are reviewable by a one-judge district court in a suit brought under the provisions of §§ 17(9), 1336 and 1398. *United States* v. *I.C.C.*, 337 U. S. 426; *Pennsylvania R. Co.* v. *United States*, 363 U. S. 202.

In *United States* v. *I.C.C., supra*, the United States as a shipper brought an action to set aside a Commission denial of reparation and an order dismissing the complaint. This Court held that the legal consequences of the order there assailed fell "squarely within the type made subject to judicial review by § 41(28)",* that a Commission order dismissing a shipper's claim for damages is an "order" subject to challenge under § 1336, and that judicial review of such an order does not require a three-judge court.

In the dissenting opinion of Mr. Justice Frankfurter in that case, an attempt was made to read into the language of Section 17(9) by implication the words "provided the decision, order, or requirement is not one for money damages". That construction of the provisions of Section 17(9) was rejected by the majority of the Court, and it was completely abandoned in *Pennsylvania R. Co.* v. *United States, supra.*

In *Pennsylvania R. Co.* v. *United States, supra*, the plaintiff railroad brought an action against the United States of America and the Interstate Commerce Commission under the provisions of §§ 17(9), 1336 and 1398 to enjoin, set aside and annul a Commission finding that certain rates were unreasonable and a Commission order denying reconsideration thereof. The Commission determination was made in a proceeding after referral of the question to it by the Court of Claims. In a unanimous deci-

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*Now 28 U.S.C. § 1336.

sion this Court characterized that case as one involving "the power of District Courts to review Interstate Commerce Commission orders determining the reasonableness of rates", pointed out (p. 205) that it had previously held that judicial review is equally available whether a Commission order relates to past or future rates, or whether its proceeding follows referral by a court or originates with the Commission, citing *Eldorado Oil Works* v. *United States,* 328 U. S. 12, and concluded that the plaintiff railroad was entitled to have the Commission order judicially reviewed and that jurisdiction to review such an order is vested exclusively in the district courts, citing 28 U.S.C. § 1336, and 49 U.S.C. § 17(9). The court also cited *Seaboard Air Line R. Co.* v. *Daniel,* 333 U. S. 118, 122, in which it stated that "federal district courts have exclusive jurisdiction of suits to enjoin, set aside, annul, or suspend an order of the Commission", and also that "in such suits the United States is an indispensible party". The Court also held that the order was properly reviewable by a one-judge rather than a three-judge district court because it was essentially one "for the payment of money" within the terms of 28 U.S.C. 2321 and 2325, which exempt such orders from the three-judge court procedure of 28 U.S.C. 2224, citing *United States* v. *I.C.C., supra.*

National Van Lines, Inc. v. *United States,* 326 F. 2d 362 (C. A. 7, 1964), is a decision in substantial accord with the decision of the Court of Appeals in the instant case. That action was brought under Sections 17(9), 1336 and 1398, among others, and sought to set aside administrative findings of the Commission and a declaratory order based thereon. The Court sustained the carrier's right to maintain the action. Although that case involved a question substantially similar to that involved here, neither the Commission nor the United States sought review of that decision by this court.

In summary, the findings and orders assailed in the instant case are substantially the same as those which were

involved in *United States* v. *I.C.C., supra, Pennsylvania R. Co.* v. *United States, supra,* and *National Van Lines, Inc.* v. *United States, supra.* Those cases make it clear that such administrative findings and orders relating to the payment of money are reviewable by the district courts under Section 17(9) and Section 1336.

B. Section 16(2) is not a "review" provision.

Section 16(2) of the Interstate Commerce Act, 49 U.S.C. §16(2), is not "the exclusive method for judicial review of an order of the Commission which awards reparations". It is not a "review" section at all, nor by its language does it purport to be.

Section 16(1) of the Interstate Commerce Act provides that if, after hearing on a complaint, the Commission should determine that any party complainant is entitled to an award of damages for a violation of the act, "the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named." That paragraph makes it a mandatory duty of the Commission to issue such an order. *George Allison & Co.* v. *Interstate Commerce Com'n,* 107 F. 2d 180.

Section 16(2) provides that if a carrier does not comply with such an order, the complainant, or any person for whose benefit the order was made, may file a complaint in a United States District Court or in any State court of general jurisdiction, having jurisdiction of the parties, setting forth briefly the causes for which he claims damages and the order of the Commission. The section further provides that on the trial of such a suit, the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated.

A suit brought under the provisions of that section is not one for the "enforcement and review" of the Commission order. It is "a plenary suit for damages actually incurred by the plaintiff, by reason of violation of the Act by the

defendant as conclusively found by the Commission". *Lehigh Valley R. Co.* v. *Clark*, 207 Fed. 717, 724. This Court has also held that an action under § 16(2) is not one to enforce a reparation order; it is an action for damages. *Lewis, Etc., Co.* v. *Southern Pac. Co.*, 283 U. S. 654, 661.

Section 16(2) is and was clearly intended to be a special procedure which authorizes a complainant before the Commission to initiate a suit to recover damages "if a carrier does not comply with an order for the payment of money within the time limit in such order". The purpose of Congress was "to discourage harassing resistance by a carrier to a reparation order". *St. L. & S. F. R.R.* v. *Spiller*, 275 U. S. 156, 159.

In *Baldwin* v. *Milling Co.*, 307 U. S. 478, this Court stated (p. 482), that "the Act unmistakably evidences purpose directly to prevent interposition of *pleas lacking merit* and so *coercively* to bring about prompt payment of the Commission's awards", citing *St. L. & S. F. R.R.* v. *Spiller*, *supra*. It further stated (p. 483) that "Sections 16(1) and 16(2) indicate legislative purpose to penalize failure of carriers, *having no defense*, to pay damages in accordance with the terms of the commission's findings and reparation orders".*

As a suit for damages rather than a suit to enforce a reparation order it falls within the prohibition of § 17(9) which states that "a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, *but not otherwise*".*

In other words, the jurisdiction embodied in § 1336 may not be availed of by a district court in a suit instituted

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* Italics added.

under § 16(2) because such a suit is not one "to enforce, enjoin, suspend, or set aside orders of the Commission".

Thus, § 17(9) by its own terms provides for the "exclusive method for judicial review of an order of the Commission which awards reparation".

Section 17(9) was not enacted until 1940 [54 Stat. 916], almost thirty years after the decision of this Court in *Mitchell Coal Co.* v. *Penna. R. R. Co.*, 230 U. S. 247. If, as this Court there said, the administrative findings are conclusive in a § 16(2) suit, it must follow that district courts are without jurisdiction to review such findings and set them aside. Thus, almost thirty years prior to the enactment of § 17(9) this Court held, at least inferentially, that § 16(2) is not a review section, but, consistent with *Lewis, Etc., Co.* v. *Southern Pac. Co., supra,* is simply a section under which an action for damages may be maintained.

Section 16(2) does not give a district court jurisdiction to enjoin or set aside an administrative finding of unjustness and unreasonableness. Neither does it provide any procedure by which the Commission and the United States may be brought in as necessary parties. In fact, Congress has expressly withheld authority from the Commission to join as a party plaintiff in suits involving orders for the payment of money. 49 U.S.C. § 16(12). Moreover, without the power in a court of law to enjoin, suspend, or set aside administrative findings of the Commission it cannot be said that review, as that term is used in the Interstate Commerce Act, the Administrative Procedure Act, and the Judicial Code, is available to a party. Those statutes expressly include that element of review; Section 16(2) does not, because by its very language it is not a review section.

The uniformity, which is the principal aim of the Interstate Commerce Act and which is discussed in the *Mitchell* and *Philbips* cases, and many other cases of this Court, cannot be accomplished or assured unless the reviewing court also has jurisdiction to enjoin and set aside the

administrative findings which are available to all shippers who have shipped under the condemned rates. Without such jurisdiction a district court can only dismiss the complaint if the administrative findings are held to be invalid or enter judgment if they are upheld. Neither the Commission nor any other district court would be bound by any judgment entered by a district court.

Moreover, the problems created by the contention that § 16(2) is a review section are compounded by the fact that the section also authorizes suits to be brought in state courts. That automatically raises serious questions of the dualism of the federal-state system, questions which require no discussion in this brief.

In any event, even if it be conceded, arguendo, that a carrier is entitled to limited "review" in a § 16(2) suit, the fact still remains, as the lower court pointed out (p. 9a) that "even 100% success in the § 16(2) suit leaves the carrier faced with unsatisfactory law for all to use, and unsatisfactory fact findings for all shippers to use".

II

Petitioner has advanced no valid reasons for granting a writ.

A. Shippers are not deprived of procedural advantages.

The principal argument of the petitioner is that the decision of the lower court will deprive shippers of procedural advantages given to them by the provisions of § 16(2). That contention is wholly without substance.

Only if the findings and order of the Commission are valid does a shipper have a valid cause of action for damages under § 16(2) and a right to the procedural advantages given thereby. If the District Court upholds the Commission's findings and order in a § 17(9) suit by a carrier, the shipper is not denied his right to maintain an action under § 16(2) nor deprived of any of its pro-

cedural advantages. On the other hand, if the reviewing court holds the Commission findings and order invalid and sets them aside, it automatically means that the shipper did not have a valid cause of action under § 16(2) to begin with and, therefore, was neither entitled to nor deprived of any procedural advantage. Moreover, as the decision of the lower court makes clear, under appropriate circumstances a shipper may obtain the benefit of all or part of those statutory advantages by intervening in the § 17(9) suit. That is exactly what a number of successful shippers have done in *Baltimore and Ohio R. Co., et al.* v. *United States, et al.*, Civil Action No. 14897, U.S.D.C. D. Md., one of the suits referred to by the petitioner (p. 6). As the United States stated in its answer to the instant complaint, "the shipper, if it so elects, may present its position through its own counsel". As the court below pointed out (12a-13a), a decree sustaining the basic validity of the findings and order of the Commission would leave interested shippers in an even more advantageous position, since the only remaining issue in a § 16(2) suit would be the limited issue of money damages, an issue which the railroads then would hardly be in a position to challenge. If the findings and order of the Commission fail to pass muster and are, therefore, "not in accordance with law", they may be set aside, and, as the lower court said (11a), "no one, whether Carrier or Shipper, will thereafter be subjected to the expense of useless litigation in numerous courts where separate § 16(2) shipper suits have been filed".

The petitioner deplores (p. 7) "the shipper's loss of his choice of venue". In doing so the petitioner overlooks the simple fact that if a shipper has a valid cause of action for damages under § 16(2) he is at liberty to file his suit and avail himself of all of the procedural advantages provided for in that section, including "his choice of venue". The petitioner also overlooks the fact that the venue provisions of § 1398 are much narrower than those of § 16(2), and are the identical venue provisions available to a shipper seek-

ing judicial review of a Commission order denying an award of reparation. However, the important and undeniable fact of the matter is that it is extremely unusual for railroads to challenge findings and orders in reparation proceedings, small or large. In the comparatively rare instances in which they do challenge them they do so because of the principle involved, not the reparation involved in a particular proceeding. Undoubtedly none of the 22 reparation orders referred to by the petitioner (pp. 7-8) was contested, but was paid promptly and without question.

B. The grounds allegedly relied upon do not impair any congressional policy.

The petitioner refers to the 1948 codification of Title 28, U.S.C. Sections 1336 and 1398, and particularly to the "except" clauses of those sections, and to the fact that those exceptions were identified in the "Revisor's Notes to Section 1398" with Section 16 of the Interstate Commerce Act, 49 U.S.C. 16. But just because the venue provisions of § 1398 do not apply to § 16(2) suits, it does not follow that the district courts were deprived of jurisdiction to review a reparation order under the provisions of § 1336. All that Congress did by the "except" clauses referred to was to exempt from the restricted venue provisions of § 1398 suits for damages brought pursuant to the provisions of § 16(2).

The petitioner assumes (p. 9) that the court below believed that a § 17(9) suit would avoid multiple suits by shippers relying upon Commission findings and orders in reparation cases, and argues that for forty years it has been the settled law that the possibility of "multiplicity of suits" does not warrant depriving shippers "of advantages conferred by Congress", citing *Pittsburgh & W. Va. Ry. Co.* v. *U. S.*, 6 F. 2d 646. The petitioner overlooks the fact that the action there involved was before a three-judge court, which clearly did not have jurisdiction of an action

to enjoin, set aside, and annul a reparation order. It also overlooks the fact that the plaintiff in that case relied solely upon the equity jurisdiction of the court, as distinguished from its statutory jurisdiction with respect to matters arising before the Interstate Commerce Commission, as well as on the sole ground that the order there assailed, unless enjoined, set aside, and annulled, would result in a multiplicity of suits. Equally important is the fact that the case was decided more than sixteen years prior to the enactment of § 17(9) in 1940, and long before the decisions of this Court in *Rochester Tel. Corp.* v. *U. S.*, 307 U. S. 125; *El Dorado Oil Works* v. *United States*, 328 U. S. 12; *United States* v. *I.C.C., supra;* and *Pennsylvania R. Co.* v. *United States, supra.* Moreover, the lower court was much more concerned with ensuring uniform treatment of all shippers similarly situated than it was with the multiplicity of suits aspects.

The petitioner assails (p. 10) the lower court conclusions that "symmetry also suggests a congressional purpose to allow review of an award-order granting reparations under § 17(9)". The petitioner either chooses to disregard or fails to understand the symmetry which the lower court obviously had in mind. The symmetry which the court had in mind had to do with the substantive right to the remedy available under §§ 17(9) and 1336 to a shipper denied reparation by the Commission in a proceeding before it, or to the losing party, whether a shipper or a railroad, in a referral action. All that the lower court did was to point out that a Commission denial of reparation is reviewable under §§ 17(9), 1336, and 1398, as is an administrative determination of primary jurisdiction elements of a referral to the Commission by a court, and to conclude that symmetry or consistency "suggests a congressional purpose to allow review of an order awarding reparation as well". That symmetry does not fail because a shipper seeking review of an order denying reparation must bring suit in the district in which he resides. That is the same venue

provision which governs the review of a referral proceeding. It is not "essentially the same venue advantage which § 16(2) of the Interstate Commerce Act" gives a shipper in a suit for damages. The venue provisions applicable to § 17(9) suits are far more restricted than those of § 16(2). The resort to a venue argument simply reflects an attempt on the part of the petitioner to avoid the sound and logical observation of the lower court.

Furthermore, the principal, if not the only, effect of Public Law No. 88-513, 78 Stat. 695, referred to by the petitioner (p. 11) is to allow the initial court in referral cases, usually the United States Court of Claims, to retain jurisdiction for the purpose of reviewing findings and orders of the Commission.

The petitioner next assails (p. 12) the decision of the court below because one result "will be to permit the transfer of the burden of defending Commission orders awarding reparations from the shipper to the Commission's legal staff". The indignation of the Commission at the thought of having to defend its award orders is surprising, to say the least. Who, if not the Commission, should be required to defend its administrative findings and orders, and who is in as good a position or as well qualified to do so? As the lower court points out (11a-12a) in a suit by a shipper under § 16(2) "the sole spokesman in behalf of the ICC's order is the private party seeking partisan relief", whereas in a suit brought under the provisions of §§ 17(9), 1336, and 1398, the United States and the Commission are made defendants "directly and immediately responsible for * * * the advocative assertion of contentions deemed essential in the public interest".

Finally, the petitioner argues that the decision below conflicts with prior holdings or statements by this Court that a shipper's suit under § 16(2) "is the exclusive route by which the Congress has authorized the courts to deter-

mine the validity of a Commission order awarding reparations". In support of that contention the petitioner cites *United States* v. *I.C.C., supra,* and *Porter Co.* v. *Central Vermont R. Co.,* 366 U. S. 272. In neither of those decisions did this Court make any such holding or statement.

And contrary to the contentions of the petitioner (p. 13), *Washington Terminal Co.* v. *Boswell,* 319 U. S. 732, did not involve provisions of the Railway Labor Act "which are closely analogous to Section 16(2)". As the lower court said (10a), "the resemblance is superficial". Under the provisions of the Railway Labor Act, 45 U.S.C.A. §§ 151, 153 First [p], the District Courts are empowered to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce *or set aside* the order of the adjustment board. No similar sweeping authority is contained or implied in the provisions of § 16(2). Moreover, the procedure created by the Railway Labor Act is not subject to the provisions of the Administrative Procedure Act, 5 U.S.C.A. §§ 1001, *et seq.* As the lower court pointed out (10a), that is not the case here.

III

The memorandum of the United States.

Despite the fact that in its answer the United States of America neither defended nor opposed the Commission orders because "the Interstate Commerce Commission and the shipper have adequate statutory authority to defend the Commission orders", it now supports the Commission petition for the reason that "it would be a statutory defendant in any action instituted by a carrier to set aside a reparations order of the Commission". Yet it expresses no intention to participate actively in the defense of any such action in the future, and there is nothing in its memorandum which suggests or implies that its answer and position in such cases in the future would not be substantially the same as its answer and position in this case.

The United States argues that the decision below may seriously impair the ability of some shippers to recover reparations awarded them by the Commission, but it makes no attempt to show how or why that might reasonably be expected. There is no basis in the decision of the lower court for the conclusion that "shippers will almost invariably be denied the benefits available to them under Section 16(2)". If a shipper has a valid cause of action for damages under § 16(2), a review action under § 17(9) will not in any way affect his right to maintain that cause of action under § 16(2), or deprive him of any of the benefits available to him under that section. Despite the obvious advantage of having the Commission assume the burden of defending its own findings and orders, shippers who are not content to rely upon the Commission for the protection of their interests in a § 17(9) suit by a railroad may intervene in such a suit if they so elect and present their position through their own counsel. If the findings and order of the Commission are upheld in such a suit, the interested shipper would then be in an even more advantageous position in a § 16(2) suit.

The contention of the United States that there is serious doubt whether the decision of the court below is consistent with the congressional policy reflected in § 16(2) was likewise advanced by the petitioner and has already been answered. It should be noted, however, that the United States as a shipper plaintiff sought review of a denial of reparation by the Commission in *United States* v. *I.C.C.*, *supra*. In that case the United States successfully took the position that §§ 17(9) and 1336 permit review of orders involving the payment of money. It seems very significant that the United States makes no attempt to reconcile the position it took in that case and the diametrically opposite position it takes here.

IV

The *amicus curiae* brief of the National Industrial Traffic League.

The League contends (pp. 2-3) that the practical effect of the decision below will be to enable "obdurate and litigious railroads" to deny shippers, and particularly small shippers, "any effective remedy for reparations for the exaction of unlawful freight rates and charges". That contention is completely preposterous on its face. Unless and until an "obdurate and litigious" railroad succeeds in having an award order enjoined, annulled or set aside under the provisions of §§ 17(9), 1336 and 1398, a shipper would be left with his statutory right to file a § 16(2) suit for damages. If the award order is set aside in a § 17(9) suit because it is "not in accordance with law", it follows that no shipper was deprived of any right or remedy. There is, therefore, no substance to the contention of the League that the practical effect of the decision below is to render § 16(2) in large part a nullity.

Much of the League's argument is in substance a repetition of the argument of the petitioner that the decision of the court below deprives shippers of "procedural benefits" accorded them by Congress, an argument which has already been answered.

The League's reference to "a small shipper" would seem to disclose a wilful lack of knowledge on its part of the facts in this case. In this intance there was no "small shipper in New York", and the "shipper's" § 16(2) suit brought in New York almost a year after the institution of the respondents' suit under § 17(9) was allegedly filed on behalf of an Illinois corporation, dissolved more than five years previously, whose office and principal place of business had been in Chicago, Ill. The extent of the effort of that shipper "to avail itself of its remedy under Section 16(2) has thus far come to naught" because by stipulation its complaint is being held in abeyance pending the final

disposition of the instant proceeding. The shipper has not been deprived of its right under § 16(2), nor of the "advantages" there provided for. The decision of the lower court makes it clear that because of the invalidity of the award order the interested shipper never had a valid cause of action under § 16(2) to begin with, and that any suit brought under that section should properly come to naught.

The League, as *amicus curiae*, raises an issue which the petitioner has not. It contends that a reparation order is not final and, therefore, is not reviewable. There is no substance whatever to that contention. As the lower court stated (6a), a reparation order "has all the characteristics of finality so far regarded as essential to court review under statutes comparable to those here involved", citing *Rochester Tel. Corp.* v. *United States, supra; Columbia Broadcasting System* v. *United States,* 316 U. S. 407; *Frozen Food Express* v. *United States,* 351 U. S. 40; *United States* v. *Storer Broadcasting Co.,* 351 U. S. 192; *El Dorado Oil Works* v. *United States, supra.*

CONCLUSION

For the reasons hereinbefore given, the respondents submit that the petition should be denied.

Respectfully submitted,

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Certificate of Service.

I, J. Edgar McDonald, attorney of record for the respondents in this proceeding, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served copies of the foregoing brief on the several parties to this action, as follows:

1. On the petitioner, the Interstate Commerce Commission, by mailing copies in duly addressed envelopes with first class postage prepaid, to its attorneys of record, Robert W. Ginnane, General Counsel, and Leonard S. Goodman, Assistant General Counsel, Interstate Commerce Commission, Washington 25, D. C.

2. On the United States of America, by mailing copies in duly addressed envelopes with first class postage prepaid, to its attorney of record, Archibald Cox, Solicitor General, Department of Justice, Washington, D. C., 20530.

3. On The National Industrial Traffic League, by mailing copies in duly addressed envelopes to its attorneys of record, John F. Donelan and John M. Cleary, 700 Brawner Building, 888 17th Street, N.W., Washington, D. C., 20006.

This 11th day of December, 1964.

J. Edgar McDonald,
466 Lexington Avenue,
New York 17, N. Y.

APPENDIX

Relevant Portions of Statutes Involved

5 U.S.C.A. § 1001(d), (f), and (g):

"(d) 'Order' means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. 'Adjudication' means agency process for the formulation of an order."

"(f) 'Sanction' includes the whole or part of any agency (1) prohibition, requirement, limitation, or other condition affecting the freedom of any person; (2) withholding of relief; (3) imposition of any form of penalty or fine; (4) destruction, taking, seizure, or withholding of property; (5) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees; (6) requirement, revocation, or suspension of a license; or (7) taking of other compulsory or restrictive action. 'Relief' includes the whole or part of any agency (1) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy; (2) recognition of any claim, right, immunity, privilege, exemption, or exception; or (3) taking of any other action upon the application or petition of, and beneficial to, any person."

"(g) 'Agency proceeding' means any agency process as defined in subsections (c), (d), and (e) of this section. 'Agency action' includes the whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act."

5 U.S.C.A. § 1009:

"Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion."

"(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof."

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 606

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

ATLANTIC COAST LINE R. CO., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION AND FOR THE UNITED STATES AS AMICUS CURIAE[1]

OPINIONS BELOW

The opinion of the court of appeals (R. 51–59) is reported at 334 F. 2d 46. The opinion of the district court (R. 28–37) is reported at 213 F. Supp. 199. An earlier order of the district court (R. 26), denying the Commission's motion to dismiss, is not reported. The reports of the Commission (R. 6–17) are reported at 303 I.C.C. 25 and 311 I.C.C. 315.

JURISDICTION

The judgment of the court of appeals was entered on July 8, 1964 (R. 60). The petition for a writ of

[1] The United States did not participate in the district court and did not appeal from the decision of the district court to the court of appeals. It joins in this brief as an *amicus curiae*.

certiorari was filed on October 20, 1964, and was granted on January 18, 1965 (R. 61). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a railroad may bring suit against the Interstate Commerce Commission under Section 17(9) of the Interstate Commerce Act and 28 U.S.C. 1336 and 1398 to set aside an order of the Commission awarding reparation to a shipper in lieu of defending an enforcement action brought by the shipper under Section 16(2) of the Act.

STATUTES INVOLVED

Section 1336 of 28 U.S.C. provides:

> Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission.

Section 1398 of 28 U.S.C. provides:

> Except as otherwise provided by law, any civil action to enforce, suspend or set aside in whole or in part an order of the Interstate Commerce Commission shall be brought only in the judicial district wherein is the residence or principal office of any of the parties bringing such action.

Section 17(9) of the Interstate Commerce Act, as amended, 49 U.S.C. 17(9), provides as follows:

(9) *Judicial relief from decisions, etc., upon denial or other disposition of application for rehearing, etc.*

When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or a board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or any appellate division, a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise.

Section 16(2) of the Interstate Commerce Act, as amended, 49 U.S.C. 16(2), provides as follows:

If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the district court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any State court of general jurisdiction having jurisdiction of the parties, a complaint setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for

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> damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated, and except that the plaintiff shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the plaintiff shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.

STATEMENT

On February 10, 1958, the Commission issued a report finding that the rates charged the Thomson Phosphate Company on several shipments of phosphate rock from Florida to Illinois during a period extending from 1945 to 1950 were unjust and unreasonable and that the shipper was entitled to reparations (R. 6–13). *Thomson Phosphate Co.* v. *Atlantic Coast Line R. Co.*, 303 I.C.C. 25 (1958). When the respondent railroads refused to certify the shipper's statements showing the shipments it had made during the period under review, the Commission reopened the proceeding for determination of the exact amount of reparations due. Following these additional proceedings, the Commission issued a report on September 28, 1960, finding that Thomson was entitled to reparations from the carriers of $8,889.76, plus interest. *Thomson Phosphate Co.* v *Atlantic Coast Line R. Co.*, 311 IC.C. 315 (1960) (R. 14–17). The Commission entered an order authorizing and directing respond-

ents to pay the sum on or before December 1, 1960.[2]

On September 6, 1961, the affected carriers brought the present suit in the United States District Court for the Middle District of Florida attacking the Commission's order (R. 3). Thereafter, on August 22, 1962 (the carriers having refused to pay the award of reparations (R. 3)), Thomson filed an action in the United States District Court for the Southern District of New York pursuant to Section 16(2) of the Interstate Commerce Act, *supra,* to enforce the Commission's order and collect the award (R. 3, 41–49). Thomson's suit was stayed pending disposition of the litigation initiated by the railroads (R. 3). On May 15, 1962, the Florida district court denied a motion to dismiss filed by the Commission alleging that the carriers' sole remedy was to defend the suit brought by the shipper under Section 16(2). Proceeding to the merits, the Florida district court set aside the Commission's report and order on the ground that the claim made by Thomson was barred by the statute of limitations (R. 29–39). 213 F. Supp. 199. The sole issue raised on appeal was whether the district court had jurisdiction. The court of appeals affirmed, sustaining the jurisdiction of the Florida district court (R. 51). The Commission thereupon petitioned for a writ of certiorari.

SUMMARY OF ARGUMENT

Since 1887, the Interstate Commerce Commission has had the power to issue reparation orders to rail-

[2] This time was later extended until August 28, 1961 (R. 18–19).

roads which have charged unlawful rates. In that year, Congress enacted Section 16 of the Interstate Commerce Act to provide specifically that shippers could sue to enforce such orders. This case involves the question whether a railroad which has been ordered by the Commission to pay reparations can sue to set aside such an order rather than test it by defending against a suit brought by a shipper under Section 16.

I

The courts below held that a railroad could sue to set aside a reparation order of the Commission under Section 17(9) of the Act and 28 U.S.C. 1336, 1398. Those provisions originated in similar form (insofar as relevant here) in the Hepburn Act of 1906, which gave the district courts jurisdiction over suits to set aside Commission orders. While the language of the Hepburn Act makes no distinction between various kinds of Commission orders, we submit that Congress clearly did not intend to include suits involving reparation orders. The words should not be interpreted in a manner inconsistent with the statute's legislative history, purpose, and long-standing construction. See, *e.g., United States* v. *American Trucking Associations,* 310 U.S. 534, 543–544; *Harrison* v. *Northern Trust Co.,* 317 U.S. 476–479.

Here, the legislative history of the Hepburn Act shows that Congress did not propose to grant carriers, for the first time, the right to sue in order to set aside orders awarding reparations to shippers. Congress intended only to make minor changes in the existing

procedures concerning those orders—procedures which already allowed shippers to sue for enforcement. These changes, moreover, were designed to benefit shippers. If, as the lower courts held, railroads may sue to set aside reparation orders, the Hepburn Act, contrary to Congress' design, actually narrowed the rights previously accorded shippers.

Furthermore, the legislative history of the Hepburn Act shows that Congress provided for suits to set aside Commission orders only because, for the first time, it had made certain Commission orders self-executing. *United States* v. *Los Angeles R.R.*, 273 U.S. 299, 309. Rate orders had to be obeyed upon pain of heavy fine without any need for judicial enforcement. Unless railroads were allowed to bring suit to set aside such orders, they could not litigate the validity of the Commission's orders without subjecting themselves to serious penalty. Similarly, unless shippers could bring suit to set aside the refusal of the Commission to issue reparation orders on their behalf, they would have no opportunity for judicial review. See *United States* v. *Interstate Commerce Commission*, 337 U.S. 426, 433–434. In contrast, the railroad is fully protected if it is required to wait until enforcement is sought before challenging a grant of reparations. Cf. *United States* v. *Los Angeles R.R., supra.*

The provision in the Hepburn Act has been continued to date. At no time during this lengthy period has Congress indicated—despite several recodifications, amendments, and new provisions based on the

Hepburn Act—that railroads may sue to set aside reparation orders.

II

Not only is there no need for allowing the railroads to sue to set aside the Commission's reparation orders, such a remedy would impair enforcement of the Act. The shipper is already placed by the Act in a less advantageous position with regard to reparation orders. Unlike the situation which prevails in the case of other orders, the railroad incurs no penalties by refusing to obey, and there is no authority in the Commission or the United States to sue for enforcement. Consequently, the shipper can obtain the benefit of the Commission's order only by undertaking the burden of litigation. The only compensating benefits the shipper receives is that in a suit brought by him to enforce a reparation order under Section 16(2) he has the choice of venue and is relieved of court costs and, if successful, attorney's fees. These benefits are lost if the railroad has the option of bringing suit against the Commission to set aside the order. If the shipper intervenes in such a suit, he has neither the choice of forum nor the benefit of the provisions relating to costs and fees. And even if the shipper is successful in that action, the railroad is still not required to obey the Commission's order until the shipper has brought an enforcement action under Section 16(2).

If railroads can bring suits to set aside Commission reparation orders, a heavy added burden will also fall upon the Commission. Most such orders do not involve questions of general importance. This was

doubtless the reason why Congress did not authorize the Commission (as well as shippers) to sue for enforcement and provided that such suits should be heard by one-judge courts. The policy thus adopted by Congress—leaving enforcement of reparation orders to shippers' suits under Section 16(2)—would be defeated if any railroad could simply sue the Commission to set aside the order.

Nor does granting the option to the carrier serve any other policy. As we have seen, the railroad incurs no penalty if it awaits an enforcement action brought by the shipper. Moreover, experience has shown that this approach has not led to a multiplicity of suits.

III

Finally, the construction of the review procedures adopted by the court below is contrary to the assumptions long made by the railroad industry and the courts. Over the long course of years only three previous suits were brought by carriers on the theory that they could initiate proceedings to review reparation orders, and two were unsuccessful. This Court, in considering procedures relating to judicial review of such orders, has taken note of the shipper's remedy under Section 16(2), but has never intimated that any other procedures were available. In short, during the fifty-odd years since passage of the Hepburn Act it has become accepted that the district courts have no jurisdiction to hear a case of this kind.

ARGUMENT

Introduction

The issue in this case is whether a railroad may bring suit in the federal district courts to set aside a reparation order of the Interstate Commerce Commission or, in order to challenge it, must await the suit brought by the shipper to enforce the order. The court of appeals relied on three statutory provisions—Section 17(9) of the Interstate Commerce Act and 28 U.S.C. 1336 and 1398—as conferring jurisdiction on the federal courts over suits brought by railroads to set aside reparations orders. While two of these sections, as we will show below, do not relate to jurisdiction at all, 28 U.S.C. 1336 does confer jurisdiction over "any civil action to * * * set aside * * * any order of the Interstate Commerce Commission."

Section 1336 is broad enough in terms to include actions to set aside reparation orders as well as other Commission orders. However, it is an axiom of the law, repeatedly reaffirmed by this Court, that the general words of a statute should not be applied literally to every instance within them, when to do so would work a result inconsistent with the legislative history, purpose, and long-standing construction. *E.g., United States* v. *American Trucking Associations,* 310 U.S. 534, 543; *Harrison* v. *Northern Trust Co.,* 317 U.S. 476, 479; *Helvering* v. *New York Trust Co.,* 292 U.S. 455, 464–465; *Lynch* v. *Overholser,* 369 U.S. 705, 710; *Holy Trinity Church* v. *United States,* 143 U.S. 457. As stated in the *American Trucking Associations* case, "[w]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear

the words may appear on 'superficial examination.'" 310 U.S. at 543–544. That precept, we urge, controls this case.

I

THE HISTORY OF THE STATUTORY REVIEW AND ENFORCEMENT PROCEDURES SHOWS THAT THE EXCLUSIVE METHOD FOR REVIEW OF REPARATION ORDERS IS IN AN ENFORCEMENT PROCEEDING BROUGHT BY THE SHIPPER UNDER SECTION 16(2)

A. THE HEPBURN ACT DID NOT GIVE RAILROADS THE RIGHT TO SUE TO SET ASIDE REPARATION ORDERS

1. The Act of 1887

The original Interstate Commerce Act, 24 Stat. 379, gave the newly created Commission the authority to decide whether the rates of railroad carriers were unreasonable or discriminatory and to award "reparation" to shippers. None of the Commission's orders, however, were self-executing; the orders did not go into effect until an enforcement proceeding was brought, and the railroad was under no penalty if it disobeyed the Commission's determination before that time.

Section 15 of the Act, 24 Stat. 384, authorized the Commission to serve a copy of any report concerning violations of the Act on the offending carrier, "together with a notice to said common carrier to cease and desist from such violation, or to make reparation for the injury so found to have been done." If the carrier did not comply with the Commission's report the Commission or any interested person could sue in the circuit court under Section 16 to enforce the

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award of reparations. In such suits, the report constituted *prima facie* evidence.

The 1887 Act (as well as the 1889 Act discussed below) did not provide for either the shipper or the railroad to sue to set aside the Commission's order. "For the first nineteen years of the Commission's existence [until the Hepburn Act] no order was * * * reviewable" upon direct appeal. *United States* v. *Los Angeles R.R.*, 273 U.S. 299, 309. The Third Circuit expressly so held as to reparation orders. *Western N.Y. & P. R. Co.* v. *Penn Refining Co.*, 137 Fed. 343, 354 (1905), affirmed 208 U.S. 208.

2. Act of March 2, 1889

While Congress provided in the Act of 1887 for enforcement of Commission orders, this procedure proved inadequate in the case of reparation orders. The Commission stated in its First Annual Report to Congress (p. 27) that it did not have the "general power to award damages in the cases of which it may take cognizance," since the orders could not be enforced. The 1887 Act provided only for enforcement of its orders in courts of equity, and such proceedings in cases involving the payment of money, the Commission concluded, would deprive the parties of their right to trial by jury.

The Act of March 2, 1889, provided for trials by jury whenever the Seventh Amendment required them. 25 Stat. 855, 860–861. Enforcement proceedings, it declared, could be brought by "any company or person interested" in the Commission's order. *Id.* at 861. Thus, Congress, at an early date, explicitly gave shippers the right to bring actions to enforce reparation orders.

The purpose of this provision was explained by its sponsor Senator Cullom (19 Cong. Rec. 5150):

> As it now stands the sixteenth section of the act provides a summary and effective method for the prompt enforcement in an equity court of the administrative orders of the commission correcting unjust discrimination or unlawful preference or extortion and other violations of the statute involving matters of general public interest. As to all such matters the section is already as strong as it can be made, and there can be no question as to the propriety of the procedure prescribed. So far as such matters are concerned the section is left substantially as it stands by the amendment, except that it is limited in its application to that class of cases. The amendment then proposed an addition to the section to provide for the class of cases requiring trial by jury, sending such cases to the circuit court sitting as a court of law, and making provision for a hearing within not more than forty days after the petition is filed.

See also 19 Cong. Rec. 8554.

Soon after the enactment of the amendment, the Commission explained its effect (Fifth Annual Report of I.C.C. to Congress, p. 10 (1891):

> In a number of complaints made in the past year the Commission has been asked to order reparation for damages alleged to have been sustained. Prior to the amendment of March 2, 1889, no provision was made for enforcing in the courts by judgment and execution any recommendation or order for such reparation which the Commission might make. As the law then stood any order of reparation would have been altogether ineffectual, and the Commis-

sion generally declined to consider the question of damages, and confined its recommendations or orders to questions of regulation or matters of an injunctive character, to prevent the continuance of wrong rather than to afford redress for past injuries.

The amendment of March 2, 1889, provided a summary remedy for the recovery of damages in court by the party to whom the Commission might award reparation * * *.

3. Hepburn Act of 1906

The Hepburn Act provided that the Commission, upon finding rates to be unlawful, could prescribe just and reasonable rates for the future. Such orders were made self-executing: "All orders of the Commission, except orders for the payment of money, shall take effect within such reasonable time, not less than thirty days * * * as shall be prescribed in the orders of the Commission." Section 4, 34 Stat. 589. Any carrier which failed to obey an order was subject to a penalty of $5,000 and every day's violation was a separate offense. Section 5, 34 Stat. 591. The same section further provided for enforcement by the Commission or any injured party, if "any carrier fails or neglects to obey any order of the Commission, other than for the payment of money, while the same is in effect." Section 5, 34 Stat. 591. In contrast, however, only shippers could sue to enforce reparation orders: "If a carrier does not comply with an order for the payment of money within the time limit in such orders, the complainant, or any person for whose benefit such order was made may file in the circuit court" a suit to enforce the order. Section 5, 34 Stat. 590.

Section 5 of the Hepburn Act also provided that "The venue of suits brought in any of the circuit courts of the United States against the Commission to enjoin, set aside, annul, or suspend any order or requirement of the Commission shall be in the district where the carrier against whom such order or requirement may have been made has its principal operating office * * *." 34 Stat. 592. While this provision is phrased in terms of venue, it provided, for the first time, for the direct review of Commission orders. *United States* v. *Los Angeles R.R., supra,* 273 U.S. at 309. This language was interpreted in an early case to cover cases to set aside reparation orders. *Southern Ry. Co.* v. *United States,* 193 Fed. 664 (Commerce Ct.). However, the decision did not consider the Act's legislative history.[2a] As we will now show, that history makes clear, despite the broad language of the statute, that Congress did not intend this provision to apply to reparation orders.

In the hearings on the Hepburn Act, shipper interests urged the Congress, if it should enact new legislation relating to reparations, to preserve the remedies provided shippers under the 1887 and 1889 Acts. S. H. Cowan[3] testified before a House committee for

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[2a] The *Southern Ry.* decision, while directly involving the Mann-Elkins Act (which is discussed below), was based on the court's construction of the Hepburn Act. Since the case was later dismissed on motion of the railroad, it could not be appealed. 4 I.C.C. Acts Ann. 3141.

[3] Mr. Cowan was then engaged in an extensive rate and reparation proceeding before the Commission following lengthy court litigation. See *Interstate Commerce Commission* v. *Chicago, B. & Q. R. Co.*, 186 U.S. 320; Eighteenth Annual Report of I.C.C. to Congress, pp. 62–64 (1904).

the Cattle Raisers Association that (Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 10431, *et al.*, to amend the Interstate-Commerce Law, H. Doc. No. 422, 58th Cong., 3d Sess., p. 291 (1904)):

> In addition to the common law giving a remedy to recover in these cases (I have cited you a case where the Supreme Court has, in a comparatively recent decision, so held) the interstate-commerce act says I am entitled to recover for every damage and injury which may be done to me by any common carrier in violation of the provisions of that act, and that I have a right to go before any court and sue for that and recover it in any circuit court of the United States. What better remedy do you want than that? Why should there be a bond provided which may, perchance, compel a shipper in California to come to Washington for the purpose of prosecuting before the Interstate Commerce Commission a $50 claim? Therefore, so far as the remedy is concerned with respect to recovery back of what is unlawfully paid, *the law now provides the complete remedy for such recovery. And it is foolish to disturb that law.* [Emphasis added.]

Furthermore, the interstate-commerce act provides that the shipper may bring suit in the United States circuit court in the first instance to recover his damages, or he may file his claim before the Interstate Commerce Commission and have them hear the facts and let them say what reparation they shall recommend. And when they recommend reparation and the railroads are not a mind to pay it, then

> he can file suit in the circuit court of the United States and the findings of the Interstate Commerce Commission upon the facts are prima facie evidence thereof.

Instead of merely retaining the former law, Congress actually aided the shipper. The House committee's report on the bill which became the Hepburn Act explained that the "amendment to section 16 of the act of 1887 * * * is intended to aid complainants in whose behalf damages are awarded, on complaint, by the Commission." H. Rep. No. 591, 59th Cong., 1st Sess., p. 5. Congressman Hepburn similarly stated during the debate over the bill (40 Cong. Rec 2256):

> We have modified somewhat that section of the statute that sought to give a wronged shipper the power to be righted through the Commission and through the courts.
>
> Heretofore practically that part of the law has been inoperative. We have now, we think, somewhat smoothed the machinery, so that when damages have been awarded by the Commission the complainant may, by simpler processes in the courts, recover judgment.

Prior to the Hepburn Act, the 1887 and 1889 Acts gave the shipper seeking to enforce reparation orders a choice of venue between the principal place of business of the carrier or the place where the Commission's order was violated and provided for reasonable attorney's fees for the shipper if he prevailed. 25 Stat. 861. The Hepburn Act gave him the opportunity to sue in the district of his own residence, where the carrier has its principal operating office, or through which the carrier runs. Section 5, 34 Stat. 590.

Besides reasonable attorney's fees, if he prevailed, the shipper was also made exempt from costs in the district court and in resisting an appeal. *Ibid.*

If the Hepburn Act were read to grant railroads the option of suing to set aside reparation orders, the result would be to deprive the shipper of these advantages—not only those granted by the Hepburn Act but those in the 1887 and 1889 Acts as well. It is true that since the railroad's suit would be against the Commission, the shipper could avoid all costs by not participating. But if the shipper decided—as persons generally do when their pecuniary interests are directly involved—to participate in the litigation, he would forgo the advantages Congress gave him in enforcement proceedings. Moreover, even if the Commission and the shipper prevailed in the railroad's suit, the railroad still would not be required to pay the reparations since no penalties are incurred if the railroad refuses. The shipper would still have the burden of bringing suit to enforce the Commission's order. Thus, it is clear that allowing suit by railroads to set aside Commission orders would mean that the Hepburn Act, instead of aiding the shipper as Congress proposed, would lessen his procedural rights.[4]

The legislative history of the Hepburn Act also shows that Congress provided for suits to set aside Commission orders only because, for the first time, it was making some orders self-executing. Thus, railroads were required to obey Commission rate orders instanter on pain of heavy penalty. During the debate in the Senate, Senator Clapp, a member of the

[4] See also the discussion below, pp. 31–35.

committee and supporter of the bill, stated that "under existing law the suit brought by the Commission is the first suit brought." 40 Cong. Rec. 5133. In reply, Senator Foraker, another committee member but an opponent of the bill, remarked (*ibid.*):

> It is only because we are now proposing to change the law and to authorize the Commission to make a rate and compel the carrier to put it into operation, unless he submits to a penalty of $5,000 a day for not doing it, that the other provision about applying for an injunction is incorporated in the bill.

As Mr. Justice Brandeis stated in *United States* v. *Los Angeles R.R., supra,* 273 U.S. at 309, "The statutory jurisdiction to enjoin and set aside an order was granted in 1906, because then, for the first time, the rate-making power was conferred upon the Commission, and the disobedience of its orders was first made punishable. Hepburn Act, June 29, 1906, c. 3591, § 2–7, 34 Stat. 584, 586–595." In contrast to self-executing orders, there was no need for Congress to provide a new remedy to set aside Commission orders which still had no effect until an enforcement proceeding was brought. As to such an order, railroads could still safely refuse to obey and defend the proceedings which were ultimately brought to enforce them.

Moreover, neither the proponents nor the opponents of the Hepburn Act even intimated that railroads were being accorded authority to seek review of reparation orders. Thus, Senator Chester Long noted: "The bill provides that *its orders, except for the pay-*

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ment of money, shall go into effect (emphasis added) within thirty days *unless the same shall* be suspended, modified, or set aside by the Commission or *be suspended or set aside by a court of competent jurisdiction"* (emphasis in original). 40 Cong. Rec. 4638. In the absence of any indication that an important new right was being given to railroads in reparation cases and the very strong evidence that no such right was intended, it seems clear that the provision ought not be read to authorize carrier suits to set aside reparation orders.

B. THE PRESENT STATUTES ARE SUBSTANTIALLY THE SAME AS THE HEPBURN ACT

1. Mann-Elkins Act of 1910

The Mann-Elkins Act of 1910 created a special tribunal known as the Commerce Court and gave it jurisdiction over all suits brought by the Commission or any injured party to enforce Commission orders "other than for the payment of money." 36 Stat. 539, 555. The Act provided that suits brought by shippers for the enforcement of reparation orders should continue to be brought in the circuit courts under the same rules as to venue and costs as applied under the Hepburn Act. *Id.* at 554.

The Act also provided that "[c]ases brought to enjoin, set aside, annul, or suspend" any Commission order shall be brought in the Commerce Court. This was substantially the same provision as that in the Hepburn Act giving jurisdiction to the circuit courts, except that the latter was phrased in terms of venue. 36 Stat. 539; see also *id.* at 542. The jurisdiction of the Commerce Court was expressly stated to be

exclusive. *Id.* at 540. On the other hand, the Act made clear that it was not intended to give the Commerce Court any more jurisdiction than that previously existing in the circuit courts. *Id.* at 539. Thus, just as a railroad could not sue to set aside a reparation order under the Hepburn Act, the statutory language makes clear that this was equally true as to the Mann-Elkins Act. But see *Southern Ry. Co.* v. *United States, supra.*

Moreover, the legislative history of the Mann-Elkins Act provides additional support for not construing the provision allowing suits to set aside Commission orders to apply to reparation orders. The Act provided that all determinations of the Commerce Court were directly appealable to this Court. 36 Stat. 542. But suits to enforce reparation orders, which had to be brought by shippers in the district court, were subject to ordinary appellate procedures. The expedited appeal for cases in the Commerce Court was designed for orders of national importance, such as railroad rate orders, in order to prevent prolonged litigation. President's Message to Congress, 45 Cong. Rec. 7567–7568. In contrast, enforcement proceedings for reparation orders were deemed "local and isolated questions" not requiring an accelerated appeal. S. Rep. No. 355, 61st Cong., 2d Sess., pp. 1–2; *United States* v. *Interstate Commerce Commission,* 337 U.S. 426, 441–442.

Suits to set aside reparation orders, like enforcement proceedings involving the same kind of orders, are equally lacking in national importance. It can hardly be assumed that Congress would provide that one,

but not the other, type of proceeding would be governed by the expedited procedure. Thus, the fact that the determinations by the Commerce Court of suits to set aside Commission orders were directly appealable to this Court, gives considerable support to a conclusion that suits to set aside reparation orders could not be brought.[5]

2. Urgent Deficiencies Act of 1913

The Urgent Deficiencies Act of 1913 abolished the Commerce Court and transferred its jurisdiction to the district courts. 38 Stat. 219. The Act modified the venue of suits to set aside Commission orders and provided that such suits must be heard by three-judge statutory courts. *Id.* at 219, 220. There is no indication in either its language or history that it was intended to expand the power of the courts to set aside Commission orders as conferred in the Hepburn Act.

In *United States* v. *Los Angeles R.R., supra,* 273 U.S. 299, this Court considered the right of the railroads to seek to set aside a valuation order of the Commission under the Urgent Deficiencies Act. The Court held that the district courts lacked this jurisdiction because the order did not itself have any actual effect on the railroad, but merely required further proceedings in which the order would constitute only *prima facie* evidence. *Id.* at 309–311. Similarly, here, the Commission's order is not self-executing—it constitutes only *prima facie* evidence in an

[5] See pp. 23–25 below for the analogous argument under the Urgent Deficiencies Act of 1913.

enforcement proceeding which must be brought by the shipper before the order has any real effect.

Furthermore just as in the case of the Mann-Elkins Act, expedited appeals directly to this Court were provided for in the case of suits to enforce Commission orders, other than involving the payment of money, and in the case of suits to set aside Commission orders. 38 Stat. 220. Again, this was done in order to permit prompt review of Commission orders of broad importance. Hearings before the Subcommittee of the Senate Committee on Appropriations on H.R. 7898, 63d Cong., 1st Sess., pp. 293–299, 300. The fact that Congress did not provide for accelerated review of suits to enforce Commission reparation orders is persuasive that suits to set aside such orders were not regarded as authorized.

In *United States* v. *Griffin,* 303 U.S. 226, 234, a suit was brought to set aside the Commission's refusal to increase railway mail compensation pursuant to the provision of the Urgent Deficiencies Act relating to review of Commission orders. The Court held that the district court did not have jurisdiction. It reasoned that the Urgent Deficiencies Act of 1913 provided for direct appeal to this Court, that this "extraordinary remedy" was designed for matters of "wide public interest," and that no such interest existed concerning the validity of railway mail orders. *Id.* at 234.

Similarly, in *United States* v. *Interstate Commerce Commission, supra,*[6] suit was brought under the Urgent Deficiencies Act of 1913 to set aside a Com-

[6] This case is also discussed below at pp. 36–37, 41.

mission order which denied reparations to the government. While the Court held that there was jurisdiction to hear the case, it also held that only a one-judge court was required. The Court said that, despite the fact that the Urgent Deficiencies Act stated that three-judge courts should hear suits to set aside Commission orders, Congress intended to limit this procedure only to "orders of widespread importance" and that reparation orders did not fall into this category. 337 U.S. at 442. In so holding, the Court was moved by the consideration that the order refusing reparations could never be judicially reviewed unless the injured shipper could bring suit to set it aside. 337 U.S. at 433–435. Moreover, the Court noted that railroads could obtain a judicial determination of the validity of a Commission order requiring the payment of reparations, citing *Meeker & Co.* v. *Lehigh Valley R. Co.*, 236 U.S. 412, and *Pennsylvania R. Co.* v. *Weber*, 257 U.S. 85, which involved suits by shippers to enforce such orders under Section 16 of the Interstate Commerce Act. 337 U.S. at 435. It concluded that it could not find "a congressional intent to guarantee railroads complete judicial review of adverse reparation orders while denying shippers any judicial review at all." *Ibid.*

The grounds distinguishing *United States* v. *Interstate Commerce Commission* from *Griffin* are completely inapplicable here. As the Court suggested in *United States* v. *Interstate Commerce Commission*, the railroad could obtain a judicial determination of the validity of a reparation order simply by waiting for the shipper to bring suit. Thus, in the instant

case, there is no reason to seek warrant in the statute for a special procedure—review of the Commission's order by a single district judge in the railroad's suit. On the contrary, the problem is resolved by holding that the provision specifically relating to enforcement of reparation awards (Section 16(2)) is exclusive.

3. Transportation Act of 1940

The Transportation Act of 1940, 54 Stat. 899, added Section 17(9) to the Interstate Commerce Act. That subsection provides (49 U.S.C. 17(9)):

> (9) *Judicial relief from decisions, etc., upon denial or other disposition of application for rehearing*
>
> When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or a board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or any appellate division, a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise.

The court of appeals considered this provision "a statutory grant of review" (R. 58). But Section 17 as a whole deals with procedures before the Commission, not with the jurisdiction of the district courts. Thus, subsection (9) simply requires the exhaustion

of administrative remedies prior to seeking judicial review. It specifically states that suit may be "brought in a court of the United States under those provisions of law *applicable* in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission * * *" (emphasis supplied). On its face, it made no change in the existing law relating to the institution of judicial proceedings. *Malone Freight Lines, Inc.* v. *United States,* 204 F. Supp. 745, 750 (N.D. Ala.).

This view of Section 17(9) is supported by its history. Both conference reports state (H. Rep. No. 2016, 76th Cong., 3d Sess., p. 67; H. Rep. No. 2832, 76th Cong., 3d Sess., p. 72):

> A new paragraph (9) is included providing that orders of a division, an individual Commissioner, or a board shall be subject to judicial review as in the case of full Commission orders, after an application for rehearing has been made and acted upon.

Soon after passage of the 1940 Act, the Commission likewise interpreted subsection (9) simply as requiring exhaustion of administrative remedies (55th Annual Report of I.C.C. to Congress, p. 24 (1941)):

> Paragraph (9), by the last three words thereof, "but not otherwise," forces a party who is dissatisfied with a decision to pursue all of the remedies for rehearing or reconsideration before going into court. This inevitably increases the burden at the top of the agency. The former rule was that it was a matter of judicial discretion whether the aggrieved party should be required to exhaust all administra-

tive remedies before going into court against an order of the Commission. *United States* v. *Abilene & S. Ry. Co.*, 265 U.S. 274.

Thus, the Transportation Act of 1940 did not confer on the railroads any rights it did not have before. Just as the railroads could not sue to set aside reparation orders before 1940, they could not do so thereafter.

4. Proposed legislation in 1947

In 1947, Congress considered a bill which reflected its view concerning the power of the courts to hear suits seeking to set aside reparation orders. The Senate Committee on Interstate and Foreign Commerce reported a bill in the 80th Congress to provide for the judicial review of rail reorganization plans approved by the Commission. The bill would have made such plans "subject to judicial review in the same manner and to the same extent as is provided by any statute or statutes of the United States for judicial review of an order of the Commission other than an order for the payment of money." S. 249, 80th Cong., 1st Sess., Sec. 6, p. 42. The Committee explained: "Reorganization plans approved under section 1 are subject to judicial review in the same manner as any order of the Commission other than an order for the payment of money." S. Rep. No. 432, 80th Cong., 1st Sess., p. 13.

While the bill was not further acted on, it does indicate the assumption of Congress in 1947 concerning the issues in this case. If the railroads are correct in their present claim that they may bring an action to set aside reparation orders, there is no difference between the direct judicial review of reparation orders

and all other orders of the Commission. This is obviously inconsistent with the bill and the committee report, both of which assumed that review of reparation orders is different from review of other orders.

5. The 1948 recodification

The court of appeals relied heavily on two provisions—Sections 1336 and 1398—of the Judicial Code as recodified in 1948 (R. 56–59). Section 1336 provides that "[e]xcept as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission." This is substantially the same wording as used in the Hepburn Act and its successors, except that a single sentence covers actions to enforce, as well as to set aside, Commission orders. The Reviser's Notes show that it traces directly back to the reenactment of the jurisdictional provisions of the Mann-Elkins Act in the Judicial Code of 1911, 36 Stat. 1148, and the Urgent Deficiencies Act of 1913, 38 Stat. 219.

Section 1398 of the Judicial Code, in language similar to that of Section 1336, provides that "[e]xcept as otherwise provided by law, any civil action to enforce, suspend or set aside in whole or in part an order of the Interstate Commerce Commission shall be brought only in the judicial district wherein is the residence or principal office of any of the parties bringing such action." This section on its face provides for venue; the jurisdiction of the federal courts over Commission orders is stated in Section 1336,

But even if this Section did implicitly confer jurisdiction, its language, like that of Section 1398, is substantially the same as in the Hepburn Act and its successors. The Reviser's Note shows that the Section is based on the venue provision of the Urgent Deficiencies Act of 1913, 38 Stat. 219, which has substantially similar language as to civil actions which may be brought.

The Reviser's Note to Section 1398 states that:

> The revised section substitutes the words "Except as otherwise provided by law" for the words of the conference bill, "in the act entitled 'An Act to Regulate Commerce, approved February 4, 1887, as amended' ". (See section 16 of Title 49, U.S.C. 1940 ed., which provides for jurisdiction and venue of actions to enforce Interstate Commerce Commission orders for the payment of money.)

It seems apparent from this comment that the revisers intended no change in the unique provisions for review embraced by Section 16(2)—provisions which, we submit, are exclusive.

In sum, the legislative history of Section 17(9) of the Interstate Commerce Act and 28 U.S.C. 1336 and 1398 shows that those provisions do not grant to railroads the right to enjoin reparation orders. While Section 1336—which is the only one of the three Sections even dealing with the issue of jurisdiction—states that "the district courts shall have jurisdiction of any civil action to * * * set aside * * * any order of the Interstate Commerce Commission," Congress never intended this provision to cover reparation

orders. This language, in just as broad a form, was enacted in the Hepburn Act of 1906. The history of that Act shows that Congress intended to have the new provision cover only self-executing orders and that, with regard to reparation orders, the only changes contemplated were to help shippers. Since the Hepburn Act, Congress has readopted substantially the same language without giving any indication that it intended to broaden the rights of carriers. Thus, railroads have no greater right to challenge reparation orders today than they have had at any time in the past half century. They must await a suit to enforce the order brought by the shipper under Section 16(2); in defense, they may seek to show that the Commission's order was invalid.

II

THE POLICIES UNDERLYING THE INTERSTATE COMMERCE ACT STRONGLY SUPPORT THE CONCLUSION THAT THE EXCLUSIVE METHOD FOR REVIEW OF REPARATION ORDERS IS IN AN ENFORCEMENT PROCEEDING BROUGHT BY THE SHIPPER UNDER SECTION 16(2)

In the preceding section, we have argued that the legislative history of the Hepburn Act and its successors shows that Congress intended to assure shippers certain prerogatives in enforcing Commission orders. Here, we contend that the conclusion which we urge will serve the policies of the Act and that there are no countervailing considerations to support the carrier's contention.

A. IF THE RAILROADS COULD SUE TO SET ASIDE REPARATION ORDERS, SHIPPERS WOULD BE PLACED AT A SERIOUS DISADVANTAGE

The basic purpose of the Interstate Commerce Act is to protect shippers from unfair practices on the part of carriers. Indeed, both the original 1887 Act and the early amendments to it were exclusively concerned with such railroad practices. Thus, it would be at odds with the Act's objectives to interpret the Hepburn Act of 1906 and its successors as giving a significant advantage to the railroads over shippers in litigation under the Act. *United States* v. *Interstate Commerce Commission, supra,* 337 U.S. at 435. This is particularly true as to litigation involving reparation orders—cases in which the Commission has already determined that the railroad has violated the Act and is liable to the shipper.

Commission orders not involving the payment of money, as earlier emphasized, are self-executing. The railroad is required to obey on pain of a penalty of $5,000 for each day's violation. 49 U.S.C. 16(8). Consequently, the burden is on the railroad to obey the order, unless it brings suit under 28 U.S.C. 1336 to set aside the order. Such a suit is against the Commission, which then has the burden and expense of defending its own order. The shipper has the *option* of deciding whether to intervene to support the order. Moreover, if the railroad does not sue to set the order aside and yet does not obey it, the Commission and the United States, as well as any injured party, may sue to enforce the order. 49 U.S.C. 16(12). Thus, again, the shipper has the *option* of having the Commission enforce its own order.

The positions of the private parties are quite different in the case of a reparation order. The order is not self-executing and the railroad can ignore it until a court orders its enforcement. Only the shipper—not the Commission—can sue to enforce it. 49 U.S.C. 16(2). The only compensating benefits the shipper receives under Section 16(2) are (1) a broad choice of venue—including, most importantly, the shipper's residence; (2) relief from court costs in the district court and (except on his own appeal) in subsequent proceedings; and (3) payment of his attorney's fees if he ultimately prevails.

If the railroad can bring suit against the Commission to set aside a reparation order, it has the option of determining whether to allow the shipper to have the advantages given him by Section 16(2). For the railroad can sue to enjoin the Commission's order before the date for compliance has arrived—*i.e., before* the shipper can bring an action under Section 16(2) to enforce the order. If the railroad decides to sue, the shipper does not have a choice of venue. Since venue in a suit to set aside a Commission order is "the residence or principal office of any of the parties bringing such action" (28 U.S.C. 1398), the railroad may sue in the district of its principal office, which may be geographically remote (as in the present case)[7] from the shipper's chosen forum. Not only does the shipper lose the choice of forum; if he decides to intervene in the suit brought by the railroad against the Commission (the suit is not against

[7] The carriers' present suit was filed in Florida (R. 20); the shipper filed suit in New York to enforce the order (R. 41–49).

the shipper) in a distant forum, his litigation costs may be greatly increased.

Moreover, the shipper will also lose the advantage given by Section 16(2) in respect to attorney's fees. It seems established that such benefits are granted only pursuant to some statutory right. *Atlantic Coast Line R. Co.* v. *Riverside Mills,* 219 U.S. 186, 207–208. Section 2323 of the Judicial Code, under which the shipper would intervene, confers no such right and we know of no alternative source of authority which would apply.[8]

This Court has commented on the importance of the provision in Section 16(2) relating to attorney's fees and court costs. In *Baldwin* v. *Scott County Milling Co.,* 307 U.S. 478, 482–483, it was stated:

> By thus laying on the carriers the burden of bringing forward evidence to overcome presumptions created against them, and by compelling them, if defeated, to pay plaintiffs' attorneys' fees in addition to the interest allowed by law, the Act unmistakably evidences purpose directly to prevent interposition of pleas lacking merit and so coercively to bring about prompt payment of the commission's awards. In *Meeker & Co.* v. *Lehigh Valley R. Co.,* 236

[8] Fees may sometimes be given by the courts to attorneys out of awards for damages or from funds created through their efforts. However, if this procedure were followed here, it would reduce the shipper's recovery below the amount to which he would be entitled under Section 16(2). Moreover, no fund or damage award would result from the injunction proceeding, since a suit under Section 16(2) would still be required by the shipper, subsequent to the carrier's injunction suit, before he could collect his money.

> U.S. 412, this Court, upholding the clause as to attorneys' fees, said (p. 433): "The provision is leveled against common carriers engaged in interstate commerce, a *quasi* public business, and is confined to cases wherein a recovery is had for damages resulting from the carrier's violation of some duty imposed in the public interest by the Act to Regulate Commerce * * *. One of its purposes is to promote a closer observance by carriers of the duties so imposed; and that there is also a purpose to encourage the payment, without suit, of just demands does not militate against its validity. And in *St. Louis & S.F. R. Co.* v. *Spiller,* 275 U.S. 156, referring to the same provision, we said (p. 159): "The purpose of Congress in making the provision concerning costs was to discourage harassing resistance by a carrier to a reparation order."

If the shipper intervenes and is unsuccessful in a suit brought by the railroad, he would be precluded by principles of *res judicata* from suing to enforce the Commission's order. On the other hand, if the Commission alone, or the Commission and shipper together, prevail in the suit brought by the railroad, still, as the court of appeals recognized (R. 59), the railroad need not obey the order. No penalties accrue until the order is *enforced* by a court. To be sure, in some instances, the enforcement suit will be readily decided under principles of *res judicata.* However, often the railroad's suit to set aside a reparation order may involve issues common to several shippers benefitting from the order. The individual shipper will still have to litigate any issues peculiar to it in the suit under Section 16(2).

Thus, if the railroads are correct in this case, they are given far greater advantages than the shipper,

even though the Commission has decided that the shipper is entitled to reparations. The railroad can, depending upon its own strategy, sue the Commission in which event the shipper has the financial burden of intervening if he wishes to defend the order in his favor. Moreover, he still has the burden of enforcing the order even if the order is upheld in the suit brought by the railroad. Such procedures give to the railroad the opportunity to place a financial burden on the shipper and to delay significantly the time of the ultimate payment. This may require many shippers to settle litigation by accepting considerably less than the amount awarded by the Commission. There is every indication that Congress had no purpose to place the shipper at such a disadvantage as against the carrier.

B. IF THE RAILROADS MAY SUE TO SET ASIDE REPARATION ORDERS, THE COMMISSION WILL BE OBLIGED TO LITIGATE NUMEROUS CASES INVOLVING RELATIVELY MINOR ISSUES

Congress provided in the original Act of 1887 that either the Commission or any interested party could sue to enforce the Commission's orders. 24 Stat. 384. However, as we have seen (pp. 12–13), this provision was not applied to reparation orders because it did not authorize jury trials. When Congress, in 1889, remedied this deficiency, it pointedly allowed enforcement proceedings in reparation cases to be brought only by "any company or person interested"—not by the Commission itself. 25 Stat. 861. This distinction was retained in the Hepburn Act of 1906 which expressly allowed the Commission or any

injured party to sue to enforce "any order of the Commission, other than for the payment of money." 34 Stat. 591. Only the injured party could sue to enforce a reparation order. *Id.* at 590. And this express distinction still exists in the present law. 49 U.S.C. 16 (2), (12).

Congress has made shippers, not the Commission, responsible for the enforcement of reparation orders. Many of these cases involve minor issues limited to particular shippers which would be more appropriately litigated by the shippers themselves. Thus, the distinction made by Congress was doubtless based on a judgment that reparation orders did not usually involve issues of broad importance. It was also for this reason, as noted above (p. 23), that Congress has provided, and this Court has determined, that cases involving reparation orders do not come within the procedures for accelerated appeal from the district courts to this Court.

There has been no instance in recent years in which the Commission has intervened in any reparation suit. However, the railroads' contention here would draw the Commission into innumerable reparation proceedings in the courts—again, we submit, a result directly contrary to the policy expressed by Congress.

C. SUITS BY RAILROADS TO SET ASIDE REPARATION ORDERS CANNOT BE JUSTIFIED ON OTHER POLICY GROUNDS

1. *United States* v. *Interstate Commerce Commission*, 337 U.S. 426, this Court held that suits to set aside Commission orders denying reparations to shippers were within the general statutory provisions authorizing suits to set aside Commission orders. Accord, *Arkansas Fertilizer Co.* v. *United States*, 193

Fed. 667, 669 (Commerce Ct.). But this Court's holding was premised on the ground that no other mode of judicial review existed and that, if no remedy were implied, shippers would be unjustifiably disadvantaged in comparison to railroads which could obtain a judicial determination of the validity of Commission orders granting reparations (see pp. 23–24 above). Here, the opposite is true. Railroads are not penalized if they refuse to obey the Commission's reparation orders; they need not obey until a court has held, upon suit by the shipper, that the order should be enforced. Such a suit must be brought within one year of the date of the order. 49 U.S.C. 16(3)(f).

Moreover, the standard for review of the Commission's order would be the same whether the railroad sued to set it aside or the shipper sued to enforce it. In actions to set aside orders not involving reparations, the Commission's findings are "made by law *prima facie* true" and "courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order." *Interstate Commerce Commission* v. *Union Pacific R. Co.*, 222 U.S. 541, 547–548; *Western Chem. Co.* v. *United States*, 271 U.S. 268, 271. Precisely the same scope of review applies under Section 16(2). See *Meeker & Co.* v. *Lehigh Valley R. Co.*, 236 U.S. 412, 430; *New Process Gear Corp.* v. *New York Central R. Co.*, 250 F. 2d 569, 572 (C.A. 2), certiorari denied, 356 U.S. 959. Consequently, the railroad can already obtain full judicial review of the order before being required to obey it; no need exists to fashion another method.

Citing *Pennsylvania R. Co.* v. *United States,* 363 U.S. 202 (R. 57), the court below nonetheless concluded that symmetry requires allowing the railroad to sue to set aside reparation orders. In the *Pennsylvania R. Co.* case, the railroad sued in the Court of Claims to recover payments which it contended were owed by a shipper (the United States). A reference was then made to the Commission to determine whether the rates were reasonable, and the Commission determined that they were not. This Court held, after noting that the Commission's order could not be reviewed in the Court of Claims (see *United States* v. *Jones,* 336 U.S. 641), that that court should stay proceedings to allow the railroad to sue in the district court to have the Commission's order set aside.

That decision is inapposite here. In the first place, if the railroad had not been allowed to sue to set aside the order in the district court, the railroad would have been denied all opportunity for judicial review of the order. See 363 U.S. at 204. Secondly, since the Commission in that case, although it decided the reasonableness of the rate, did not issue a reparation order, there was no occasion to consider the statutory and policy arguments set forth above. Thirdly, it is significant that Congress, with the endorsement of the Judicial Conference, has changed the venue and jurisdiction provisions involved in *Pennsylvania R. Co.* to allow the referring court to review the Commission's order so that the losing party need no longer start a separate suit to set aside the order. 78 Stat. 695.

2. The court of appeals also suggested that, unless the railroad can sue to set aside the Commission's

reparation order, it might be subjected to a multiplicity of suits brought by shippers in different courts (R. 56). It is true that shippers for whose benefit reparation orders are made, and all other shippers similarly situated, may sue on the orders under Section 16(2). See *Mitchell Coal Co.* v. *Penna. R.R. Co.*, 230 U.S. 247, 257; *Phillips* v. *Grand Trunk Ry.*, 236 U.S. 662, 665–666. However, a multiplicity of suits might also result if several railroads were ordered to pay reparations to a single shipper and each were allowed to bring suit to set aside the order, whereas only one suit to enforce the order could be brought. And each time a railroad sues to set aside a reparation order and loses, an additional action must still be brought by the shipper to enforce the order. Thus, considered abstractly, it is not clear whether permitting railroads to attack reparation orders would decrease or increase the amount of litigation.

Far more persuasive than any theoretical analysis is the seventy-odd years of practical experience since shippers were first allowed to bring suits to enforce reparation orders. During that time, as we show below (pp. 40–43), it has generally been assumed that railroads could not sue to set aside such orders and few such suits have been brought. Suits to enforce have provided the mode of review. And there is no evidence that different shippers have brought numerous suits in different courts to enforce the same reparation orders. Thus, the fears expressed by the railroads have not been borne out.[9]

[9] In addition, we note that multiple suits are not necessarily an evil when the issues in the various suits are not identical.

III

THE UNDERSTANDING OF THE RAILROAD INDUSTRY AND OF THE FEDERAL COURTS SUPPORTS THE CONCLUSION THAT THE EXCLUSIVE METHOD FOR REVIEW OF REPARATION ORDERS IS IN AN ENFORCEMENT PROCEEDING

It is of course familiar doctrine that the long-standing interpretation of an administrative agency is of considerable importance in interpreting a Congressional enactment. *E.g., Maintenance of Way Employes* v. *United States,* 366 U.S. 169, 179; *Norwegian Nitrogen Co.* v. *United States,* 288 U.S. 294, 315. The understanding of the industry affected by the statute is likewise of weight.

Here, is it plain that the railroad industry has almost universally assumed, since the Commission's reparation orders first became enforcible in 1889, that railroads could not bring suit to set aside such orders but must await an enforcement action brought by the shipper. Until very recently,[10] it appears that only three cases were brought by railroads to enjoin reparation orders. In two instances, the federal courts refused to entertain the suit on the ground that an

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The present suits, for example, turned on the district court's ruling on the statute of limitations without regard to the justness and reasonableness of the rates charged (R. 35–37). Other shippers might not be subject to a defense of that kind. See also *Pittsburgh & W.V. Ry. Co.* v. *United States,* 6 F. 2d 646, 648–649 (W.D. Pa., 1924).

[10] Four cases are now pending in the district courts. *Central Vermont Railway, Inc., et al.* v. *U.S. and ICC,* Civ. 4010, D. Vt.; *Atlantic Coast Line R. Co., et al.* v. *U.S. and I.C.C.,* Civ. 63–145–Civ–J, M.D., Fla.; *B. & O. R. Co., et al.* v. *U.S. and I.C.C.,* Civ. 15279, D. Md.; *B. & O. R. Co., et al.* v. *U.S. and I.C.C.,* Civ. 14897, D. Md.

later voluntarily dismissed its action. Southern Ry. C
United States, 193 Fed. 664 (1911); 4 I.C.C. Acts Ann. 3141.

action cannot be brought to set aside a reparation order. *Baltimore & O. R. Co.* v. *United States,* 12 F. Supp. 261, 263 (D. Del.) (1935), affirmed, 87 F. 2d 605, 606 (C.A. 3); *Pittsburgh & W.V. Ry. Co.* v. *United States,* 6 F. 2d 646, 648–649 (W.D. Pa.) (1924).

Moreover, both this Court and the Court of Appeals for the District of Columbia have assumed that Section 16(2) is the sole method for review of reparation orders. In *United States* v. *Interstate Commerce Commission, supra,* 337 U.S. 426, the Court, in discussing review of reparation orders, twice suggested that such review may occur only in enforcement proceedings brought by the shipper under Section 16(2). At one point, the Court cited two cases brought under Section 16(2) for the statement that "a Commission award favorable to a shipper is not final or binding upon the railroad." 337 U.S. at 435. Later, the Court noted that had "the Commission made an award to the Government it could have filed a civil suit to recover money damages under the provisions of 49 U.S.C. § 16(2)." *Id.* at 443. The dissenting Justices concluded that Section 16 is the sole basis of review for reparation orders and that the provision for suits to set aside Commission orders did not apply to orders denying reparations. *Id.* at 457.

Again, in *H. K. Porter Co.* v. *Central Vermont Ry., Inc.,* 366 U.S. 272, the Commission had found rail rates to be unjust and unreasonable, but had not ordered reparations. The Court stated that "[s]uch an order, when and if made, can be challenged before a single judge under 49 U.S.C. § 16(2)." *Id.* at 274, note 6.

In *Washington Terminal Co.* v. *Boswell,* 319 U.S. 732, this Court affirmed by an equally divided vote a decision of the Court of Appeals for the District of Columbia Circuit under provisions of the Railway Labor Act which are closely analogous to Section 16(2). Under Section 3 First (p) of the Railway Labor Act, 45 U.S.C. 153 First (p), an employee who has obtained an award of the National Railroad Adjustment Board may file suit in the district court for enforcement if the carrier does not comply with the Board's order. The court of appeals, in an opinion by Judge (later Justice) Rutledge, held that a carrier may not maintain a suit for a declaratory judgment of rights under the Railway Labor Act. 124 F. 2d 235. In words equally applicable here, he noted the "definite and special scheme" for determining the legality of an award and the "detailed plan for review" in an enforcement proceeding, both of which indicated "that the method of review provided was intended to be exclusive. If Congress had intended the Declaratory Judgments Act to be generally available to the parties, * * * there could have been no substantial reason for including in the Railway Labor Act the complex and detailed provisions for the enforcement suit * * *. More especially there could have been no such reason for writing into the statute the unusual and highly important special advantages given to the employee seeking enforcement." 124 F. 2d at 240. As Judge Rutledge further declared, "Congress had no purpose to give the statutory advantages to the employee if he should beat his employer to the courthouse, but to take them away if he should come in second. That is true whether the

employer's suit is one to restrain enforcement of the award, set it aside, declare it void, or reinterpret the original contract with the same effects upon the award." *Id.* at 242. The court expressly cited Section 16(2) of the Interstate Commerce Act as an example of a similar enforcement provision. *Id.* at 249–250.[11]

We submit that the understanding and practice which have long prevailed ought not be disturbed.

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[11] The Court of Appeals for the District of Columbia Circuit has held that a carrier can sue to set aside a reparation order of the Federal Maritime Commission. *Flota Mercante Grancolombiana* v. *Federal Maritime Commission*, 302 F. 2d 887, 894. However, the Court relied on the particular history of the Hobbs Act. It said that, in absence of this history, a "strong argument can be made that only one review should be permitted" and that this should be under a provision which is analogous to Section 16(2) of the Interstate Commerce Act. *Ibid.* The court also relied upon the fact that it was also the proper forum under the Hobbs Act for the shipper to sue to enforce the reparation order, so that the carrier's suit was in the nature of a counterclaim. *Id.* at 893.

CONCLUSION

The judgment below should be reversed and the cause remanded to the district court with instructions to dismiss the complaint.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 606

INTERSTATE COMMERCE COMMISSION,
Petitioner,

v.

ATLANTIC COAST LINE R. Co., *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS

Question Presented

Do Section 1336 of Judiciary and Judicial Procedure, 28 U.S.C. § 1336, and Section 17(9) of the Interstate Commerce Act, 49 U.S.C. § 17(9), give district courts jurisdiction of suits by railroads which seek to set aside and annul the administrative and quasi-judicial findings of the Interstate Commerce Commission and reparation award-orders based thereon, or must the district courts dismiss such complaints for lack of jurisdiction on the ground that the aforesaid findings and orders can *only* be "reviewed" as a defense to shippers' suits if, as, when, and where brought under the provisions of Section 16(2) of the Interstate Commerce Act, 49 U.S.C. § 16(2)?

Statutes Involved

With the addition of Section 10 of the Administrative Procedure Act, 5 U.S.C. § 1009, set forth in Appendix A hereof, the government statement of the statutes involved is acceptable to the respondents.

Statement

In *Thomson Phosphate Co.* v. *Atlantic Coast Line R. Co.*, 303 I.C.C. 25, and 311 I.C.C. 315 (R. 6-19), the Interstate Commerce Commission found the rates assessed on more than 600 carload shipments of phosphate rock from Prairie, Fla., to destinations in Illinois during the period from April 10, 1945, to December 31, 1950, unjust and unreasonable, and awarded reparation aggregating $8,889.76, with interest. By orders of the Commission (R. 18, 19) the railroads were "authorized and directed" to pay the reparation on or before August 28, 1961.

By complaint filed September 6, 1961 (R. 20-25) the respondents brought suit against the United States of America and the Interstate Commerce Commission in the United States District Court for the Middle District of Florida under the provisions of Section 17(9) of the Interstate Commerce Act, 49 U.S.C. § 17(9), and Sections 1336 and 1398 of Judiciary and Judicial Procedure, 28 U.S.C. §§ 1336 and 1398, to enjoin, set aside and annul the administrative and quasi-judicial findings of the Commission in the aforesaid proceedings, as well as the award-order based thereon. Among other things, the complaint alleged that the Commission erred in failing to find the proceeding before it barred by the statute of limitations of the Interstate Commerce Act, 49 U.S.C. § 16(3), in failing to observe and properly apply its own rules of practice, and in allowing prosecution of a complaint seeking damages by a corporation which had been dissolved five years previously.

By answer filed on January 5, 1962 (Appendix B hereof), the Interstate Commerce Commission admitted, without qualification, all of the jurisdictional allegations of the complaint. However, on April 20, 1962, the Interstate Commerce Commission moved the court to dismiss the complaint "for lack of jurisdiction of the subject matter, or in the exercise of its equity discretion".

By answer made on January 12, 1962 (Appendix C hereof), the United States of America neither defended nor opposed the Commission orders, pointing out that "the Interstate Commerce Commission and the shipper have adequate statutory authority to defend the Commission's orders", that the Commission "will avail itself of the statutory authorization to interpose all defenses to the plaintiffs' charges possible of being interposed", and that "the shipper, if it so elects, may present its position through its own counsel".

The District Court denied the Interstate Commerce Commission's motion to dismiss on May 15, 1962 (R. 26).

On August 22, 1962, a suit was filed on behalf of the Thomson Phosphate Company in the United States District Court for the Southern District of New York, under the provisions of Section 16(2) of the Interstate Commerce Act, 49 U.S.C. § 16(2), seeking damages based on the orders of the Commission heretofore referred to. By stipulation of the parties, that complaint is being held in abeyance pending final disposition of the instant proceeding.

On January 9, 1963, the Florida District Court found the reports and orders of the Commission unlawful and set them aside (R. 27-37).

The Interstate Commerce Commission appealed from the judgment of the District Court. It did not appeal the findings of the District Court on the merits, but only the question of the court's jurisdiction (R. 4).

On July 8, 1964, the United States Court of Appeals for the Fifth Circuit affirmed the decision and judgment of the District Court, holding that the District Court was correct in overruling the motion to dismiss, in sustaining the right of judicial review in that court under §§ 1336 and 1398, and in rejecting the contention that review had to be in the pending New York action. The Court of Appeals also concluded that the contention that the trial court having jurisdiction should nevertheless have declined to exercise it for equitable considerations was without merit (R. 59).

Summary of Argument

The issue in this case requires a determination "of the statutory mechanism for review in reparation award cases generally" (R. 55).

There are two separate and distinct aspects to a reparation order, the first an administrative finding that the assailed charges were unlawful in violation of the Interstate Commerce Act, the second a quasi-judicial finding as to the fact and amount of damage. In a Section 16(2) [49 U.S.C. § 16(2)] suit the administrative finding is "conclusive", the quasi-judicial finding is only *prima facie* correct, and only as to the latter does the carrier have a right to a judicial hearing. The administrative finding is general and every other shipper similarly situated can take advantage of the finding and order by appropriate proceedings before the Commission or the courts. *Mitchell Coal Co.* v. *Penna. R. R. Co.*, 230 U. S. 247; *Phillips* v. *Grand Trunk Ry.*, 236 U. S. 662.

Section 1336 [28 U.S.C. § 1336], relating solely to Interstate Commerce Commission orders, confers original jurisdiction upon the district courts of any action to enjoin, set aside, annul or suspend, in whole or in part, *any order* of the Commission. Section 17(9) [49 U.S.C. § 17(9)] provides that when a petition for reconsideration of *any* decision,

order or requirement of the Commission shall have been made and denied, or otherwise disposed of, a suit to enjoin, suspend or set aside such decision, order or requirement, in whole or in part, may be brought in a court of the United States under the provisions of law applicable to such suits, but not otherwise.

Two doctrines have evolved as the test of judicial reviewability of Commission orders, one the doctrine of primary jurisdiction, the other the doctrine of administrative finality. *Rochester Tel. Corp.* v. *U. S.*, 307 U. S. 125. The findings and order here under review satisfy that test.

An order dismissing a shipper's claim for damage is an order subject to challenge under Section 1336. Judicial review of such an order does not require a three-judge court. A suit to enjoin, set aside and annul a Commission finding and determination of unjustness and unreasonableness, and an order denying reconsideration thereof is one involving "the power of the district courts to review Interstate Commerce Commission orders determining the reasonableness of rates", and under Section 1336 and 17(9) judicial review is available whether the order relates to past or future rates, and that review is vested exclusively in the district courts. *United States* v. *I.C.C.*, 337 U. S. 426; *Pennsylvania R. Co.* v. *United States*, 363 U. S. 202.

A Section 16(2) suit is not one for the enforcement or "review" of a Commission order. It is a suit for damages. *Lewis, Etc., Co.* v. *Southern Pac. Co.*, 283 U. S. 654, it is "a plenary suit for damages actually incurred by the plaintiff by reason of violation of the Act by the defendant as conclusively found by the Commission". *Lehigh Valley R. Co.* v. *Clark*, 207 Fed. 717. That section does not give district courts jurisdiction to enjoin, annul and set aside administrative findings of unlawfulness or orders based thereon. In a Section 16(2) suit the court can merely enter judgment for the plaintiff or for the defendant. It cannot annul and set aside the administrative findings and

orders based thereon. The stated purpose of Section 16(2) is "to discourage harassing resistance by a carrier to a reparation order", *St. L. & S. F. R. R.* v. *Spiller,* 275 U. S. 156, "to prevent interposition of pleas lacking merit and so coercively to bring about prompt payment of the Commission's awards" and "to penalize failure of carriers, having no defense, to pay damages in accordance with the terms of the Commission's findings and reparation orders." *Baldwin* v. *Milling Co.,* 307 U. S. 478. It was never the Congressional intent to make Section 16(2) a section under which administrative findings and reparation orders based thereon might be reviewed.

The history of the statutory review and enforcement procedures show that the exclusive method for review is in proceedings brought under the provisions of Sections 1336 and 17(9). In the Hepburn Act of 1906, 34 Stat. 584, Congress expressly authorized the bringing of suits against the Commission to enjoin, set aside or suspend *any order* or requirement of the Commission. The same all-inclusive "any order" provision appears in all subsequent relevant statutory enactments. Wherever a qualification or limitation with respect to the type of order involved was intended, it was made in clear language [28 U.S.C. § 2321; 49 U.S.C. § 16(12)].

The policies underlying the Interstate Commerce Act do not support the conclusion that Section 16(2) is a review section, much less "the exclusive method for review of reparation orders". Only if the administrative findings and order of the Commission are valid does a shipper have a cause of action for damages under Section 16(2) which entitles him to the advantages or benefits provided therein. Suits by railroads for review of administrative findings and orders under Sections 17(9) and 1336 do not deprive shippers of any advantage or benefit provided in Section 16(2).

Just as the Commission is a proper party to defend an order *denying* reparation, it is a proper party to defend administrative findings and orders *granting* reparation. Suits by railroads to enjoin, annul and set aside invalid findings and orders are essential under the doctrine of primary jurisdiction in order to insure uniform treatment of all shippers, which is the basic aim of the Act.

Argument

The issue in this case is important because it requires "the determination of the statutory mechanism for review in reparation award cases generally, not merely the machinery which would satisfy this particular case, as the Court of Appeals quite properly indicated (R. 55).* The nature and legal effect of administrative findings with respect to rates and charges on past shipments and of reparation orders based thereon are of real importance in the consideration and disposition of that issue.

In *Mitchell Coal Co.* v. *Penna. R. R. Co.*, 230 U. S. 247, a leading case on the doctrine of the primary jurisdiction of the Interstate Commerce Commission, this Court made it abundantly clear that there are two separate and distinct aspects to a reparation award or order, the first an administrative finding that the assailed rates and charges are unlawful in violation of the Interstate Commerce Act, and the second a quasi-judicial finding as to the fact and amount of damage. The court, speaking of a suit brought under Section 16(2) of the Interestate Commerce Act, 49 U.S.C. §16(2), said:

> "Such orders, so far as they are administrative are *conclusive,* whether they relate to past or present rates, and can be given general and uniform operation,

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* As the government brief indicates (p. 40), there are four similar cases presently pending in various district courts.

since all shippers, who have been or may be affected by the rate, can take advantage of the ruling and avail themselves of the reparation order. They are quasi-judicial and only *prima facie* correct in so far as they determine the fact and amount of damage—as to which, since it involves the payment of money and taking of property, the carrier is by § 16 of the act given its day in court and the right to a judicial hearing." (p. 258) (Italics added)*

In *Phillips* v. *Grand Trunk Ry.*, 236 U. S. 662, which involved a suit under Section 9 of the Interstate Commerce Act, 49 U.S.C. § 9, for the recovery of damages based upon administrative findings in a proceeding before the Commission to which the plaintiff had not been a party, this Court said:

"But the proceeding before the Commission, to determine the reasonableness of the 2 cents advance, was not in the nature of private litigation between a Lumber Association and the carriers, but was a matter of public concern in which the whole body of shippers was interested. The inquiry as to the reasonableness of the advance was general in its nature. *The finding thereon was general in its operation and inured to the benefit of every person that had been obliged to pay the unjust rate.* Otherwise those who filed the complaint, or intervened during the hearing, would have

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* It is significant that where the administrative finding of unlawfulness is unjustness and unreasonableness the damage is the difference between the excessive rate and the rate declared to be just and reasonable. *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U. S. 531; *L. & N. R. R.* v. *Sloss-Sheffield Co.*, 269 U. S. 217. Thus, in a Section 16(2) suit the only issue on which the carrier has "its day in court and the right to a judicial hearing", where the administrative finding is unjustness and unreasonableness, is the making of the shipments and the paying of the charges.

secured an advantage over the general body of the public, with the result that the order of the Commission would have created a preference in favor of the parties to the record and would have destroyed the very uniformity which that body had been organized to secure. The plaintiff and *every other shipper similarly situated was entitled by appropriate proceedings before the Commission or the courts to obtain the benefit of that general finding and order.* See *Abilene Case,* 204 U. S. 446; *Robinson* v. *B. & O.,* 222 U. S. 507; *Baer Bros.* v. *Denver &c.,* 233 U. S. 479, 489, and compare *Nicola* v. *Louisville & Nashville R.R.,* 14 I.C.C. 200(4), 205." (p. 665) (Italics added)

Thus, in a suit brought by a shipper for damages under Section 16(2) under the principles laid down by this Court the administrative finding of unlawfulness is "conclusive", and it is general in its operation and inures to the benefit of every other shipper similarly situated. Similarly, in a suit under Section 9 of the Interstate Commerce Act, 49 U.S.C. § 9, unless and until an administrative finding of unlawfulness is enjoined, suspended, annulled and set aside, every other shipper similarly situated is entitled by appropriate proceedings before the Commission or the courts to obtain the benefit of that general finding and order.

That the Court of Appeals recognized and understood the significance and importance of administrative findings and reparation orders based thereon, as well as the settled law with respect to the general effect thereof as set forth in decisions by this Court, is clear from its decision (R. 55-56).

I.

The District Court Had Jurisdiction Of The Complaint

Section 1336, relating solely to Interstate Commerce Commission orders, confers original jurisdiction upon the district courts of any civil action to enjoin, set aside, annul or suspend, in whole or in part, *any* order of the Commission.

The language of Section 17(9) follows a similar pattern. It provides that when a petition for reconsideration of *any* decision, order or requirement of the Commission shall have been made and denied, or otherwise disposed of, a suit to enjoin, suspend or set aside such decision, order or requirement, in whole or in part, may be brought in a court of the United States applicable to such suits, but not otherwise.*

Section 1398 expressly authorizes the filing of any civil action to enjoin, suspend, or set aside, in whole or in part, an order of the Interstate Commerce Commission in the judicial district wherein is the residence or principal office of any of the parties bringing such an action.

Moreover, not only does Section 1336 confer jurisdiction on the district courts, but this Court has held that "federal district courts have exclusive jurisdiction of suits to enjoin, set aside, annul or suspend an order of the Commission, and that in such suits the United States is an indispensable party". *Seaboard R. Co.* v. *Daniel,* 333 U. S. 118, 122.

Stated another way, Sections 1336 and 17(9) are the statutory provisions which create the right to institute a

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* Judicial review "is clearly guaranteed under the Administrative Procedure Act", as the lower court pointed out (R. 57). However, since it is general in nature, whereas Section 17(9) of the Interstate Commerce Act, 49 U.S.C. 17(9), and Section 1336 of the Judicial Code, 28 U.S.C. § 1336, are specific review provisions applicable in connection with orders of the Interstate Commerce Commission, that section will not be discussed herein.

suit to enjoin, set aside, annul or suspend *any* decision, order or requirement of the Commission. Those sections cover the full scope of judicial review, and the complaint of the respondents is clearly within their unrestricted provisions. Nothing in those sections even remotely suggests that the *right* there given to bring actions to enjoin, suspend, set aside or annul a decision, order or requirement of the Commission does not extend to and include administrative findings and orders of the Commission in which railroads are "authorized and directed" to pay reparation or to orders denying reconsideration of such findings and orders. Had it been the intention of Congress to so limit the right there given, it obviously would have been a simple matter for Congress to have done so by the inclusion of a phrase or clause restricting the application of those sections to "orders other than for the payment of money". It did so in Section 16(12) of the Interstate Commerce Act and it did so in Section 2321 of Title 28, where it provided for the three-judge procedure.

As a matter of fact this Court has already held that findings and orders relating to money damages are reviewable by a one-judge district court in a suit brought under the provisions of Sections 17(9), 1336 and 1398.

In *United States* v. *I.C.C.*, 337 U. S. 426, the United States as a shipper brought an action to set aside a Commission denial of reparation and an order dismissing the complaint. This Court held that the legal consequences of the order there assailed fell "squarely within the type made subject to judicial review by § 41(28)",* that a Commission order dismissing a shipper's claim for damages is an "order" subject to challenge under Section 1336, and that judicial review of such an order does not require a three-judge court.

In the dissenting opinion of Mr. Justice Frankfurter in that case, an attempt was made to read into the language

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* Now 28 U.S.C. § 1336.

of Section 17(9) by implication the words "provided the decision, order, or requirement is not one for money damages". That construction of the provisions of Section 17(9) was rejected by the majority of the Court, and it was completely abandoned in *Pennsylvania R. Co.* v. *United States,* 363 U. S. 202.

In *Pennsylvania R. Co.* v. *United States,* 363 U. S. 202, the plaintiff railroad brought an action against the United States of America and the Interstate Commerce Commission under the provisions of Sections 17(9), 1336 and 1398 to enjoin, set aside and annul a Commission finding that certain rates were unreasonable and a Commission order denying reconsideration thereof. The Commission determination was made in a proceeding after referral of the question to it by the Court of Claims. In a unanimous decision this Court characterized that case as one involving "the power of District Courts to review Interstate Commerce Commission orders determining the reasonableness of rates", pointing out (p. 205) that it had previously held that judicial review is equally available whether a Commission order relates to past or future rates, or whether its proceeding follows referral by a court or originates with the Commission, citing *Eldorado Oil Works* v. *United* States, 328 U. S. 12, and concluded that the plaintiff railroad was entitled to have the Commission order judicially reviewed and that jurisdiction to review such an order is vested exclusively in the district courts, citing 28 U.S.C. § 1336, and 49 U.S.C. § 17(9). The court also cited *Seaboard Air Line R. Co.* v. *Daniel,* 333 U. S. 118, 122, in which it stated that "federal district courts have exclusive jurisdiction of suits to enjoin, set aside, annul, or suspend an order of the Commission", and also that "in such suits the United States is an indispensable party". The Court also held that the order was "properly reviewable by a one-judge rather than a three-judge District Court because it was essentially one 'for the payment of money' within the terms of 28 U.S.C. 2321 and 2325, which exempt such orders from the

three-judge court procedure of 28 U.S.C. 2224", citing *United States* v. *I.C.C.*, 337 U. S. 426.

The jurisdiction of a district court to review orders of the Commission similar to the one here under attack was also considered by the Court of Appeals, Seventh Circuit, in *National Van Lines, Inc.* v. *United States,* 326 F. 2d 362 (1964), decided January 6, 1964. There the Interstate Commerce Commission, on its own initiative, had instituted an investigation to determine whether or not certain motor common carriers of household goods had charged, demanded, collected or received compensation for the transportation of shipments of household goods which were greater or less than, or different from, the rates applicable thereon as specified in the governing tariffs. The Commission found and determined the rates legally applicable on such shipments, that numerous respondents in the proceeding had failed to collect the legally applicable charges, and that the collection by any respondent of compensation greater or less than that on the basis therein found applicable constituted a violation of the Interstate Commerce Act.

Thereafter certain motor carriers filed a complaint in the District Court under Sections 17(9), 1336 and 1398, among others, seeking to set aside administrative findings of the Commission and a declaratory order based thereon. The District Court granted a motion of the United States and the Interstate Commerce Commission, the defendants therein, to dismiss the complaint.

On appeal, the Circuit Court of Appeals reversed the lower court. In doing so the Court of Appeals considered and dealt in considerable detail with a large number of cases involving the reviewability of administrative orders, including *Rochester Tel. Corp.* v. *U. S.,* 307 U. S. 125; *El Dorado Oil Works* v. *United States,* 328 U. S. 12; *United States* v. *I.C.C.,* 337 U. S. 426; and *Pennsylvania R. Co.* v. *United States,* 363 U. S. 202. Although that case involved a question substantially similar to the one here involved,

neither the Commission nor the United States sought review of that decision by this Court.

In summary, it has been held that a shipper denied relief by the Commission may obtain judicial review of the denial order before a single-judge district court under the provisions of § 17(9) and § 1336. *United States* v. *I.C.C.*, 337 U. S. 426. It has been held that where a shipper brings a suit in a district court or a state court under the provisions of Section 9 of the Interstate Commerce Act, 49 U.S.C. § 9, or where the United States, as a shipper, interposes a counterclaim in a suit brought by the carrier in the Court of Claims, the Commission's findings on referral as to the justness and reasonableness of the rates may be reviewed in a one-judge district court "on suit of the *losing** party" under the same statutory proceedings. *Pennsylvania R. Co.* v. *United States*, 363 U. S. 202. And now it has been held that even an order declaratory in nature, yet far less definitive of the rights and obligations fixed thereunder than those fixed by the administrative findings and order of the Commission involved in this proceeding, is likewise subject to review under those very same statutory provisions. *National Van Lines, Inc.* v. *United States*, 362 F. 2d 362.

The respondents respectfully submit that the findings and orders assailed in the instant complaint are substantially, and for all practical purposes, the same as those which were involved in *United States* v. *I.C.C.*, 337 U. S. 426; *Pennsylvania R. Co.* v. *United States*, 363 U. S. 202, and *National Van Lines, Inc.* v. *United States, supra.* Those cases make it clear that administrative findings and orders relating to the payment of money are made reviewable by Section 17(9) and that under Section 1336 the district courts have jurisdiction to dispose of such complaints.

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* Italics supplied.

If an order denying reparation is an order for the payment of money and, as such, falls squarely within the type made subject to judicial review by Section 1336, as this Court held in *United States* v. *I.C.C.*, 337 U. S. 426, citing *Rochester Tel. Corp.* v. *U. S.*, 307 U. S. 125, and *El Dorado Oil Works* v. *United States*, 328 U. S. 12, it is inconceivable that an order granting reparation is not likewise one falling squarely within the type made subject to judicial review by Section 1336.

II.

Section 16(2) Is Not A "Review" Section

Section 16(1) of the Interstate Commerce Act provides that if, after hearing on a complaint, the Commission should determine that any party complainant is entitled to an award of damages for a violation of the act, "the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named". That paragraph makes it a mandatory duty of the Commission to issue such an order. *George Allison & Co.* v. *Interstate Commerce Com'n*, 107 F. 2d 180.

Section 16(2) provides that if a carrier does not comply with such an order, the complainant, or any person for whose benefit the order was made, may file a complaint in a United States District Court or in any state court of general jurisdiction, having jurisdiction of the parties, setting forth briefly the causes for which he claims damages, and the order of the Commission. The section further provides that such a suit shall proceed in all respects like other suits for damages, except that on the trial of such a suit, the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated.

A suit brought under the provisions of that section is not one for the enforcement or review of the Commission order. It is "a plenary suit for damages actually incurred

by the plaintiff, by reason of violation of the Act by the defendant as conclusively found by the Commission". *Lehigh Valley R. Co.* v. *Clark,* 207 Fed. 717, 724. This Court has also held that an action under § 16(2) is not one to enforce a reparation order; it is an action for damages. *Lewis, Etc., Co.* v. *Southern Pac. Co.,* 283 U. S. 654, 661.

Section 16(2) is and was clearly intended to be a special procedure which authorizes a complainant before the Commission to initiate a suit to recover damages "if a carrier does not comply with an order for the payment of money within the time limit in such order". The stated purpose of the statute was "to discourage harassing resistance by a carrier to a reparation order". *St. L. & S. F. R.R.* v. *Spiller,* 275 U. S. 156, 159. In *Baldwin* v. *Milling Co.,* 307 U. S. 478, this Court stated (p. 482), that "the Act unmistakably evidences purpose directly to prevent interposition of *pleas lacking merit* and so *coercively* to bring about prompt payment of the Commission's awards", citing *St. L. & S. F. R.R.* v. *Spiller, supra.* It further stated (p. 483) that "Sections 16(1) and 16(2) indicate legislative purpose to penalize failure of carriers, *having no defense,* to pay damages in accordance with the terms of the commission's findings and reparation orders".*

As a suit for *damages* rather than a suit to *enforce* a reparation order it does not come within the language of § 17(9) which states that "a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise".

In other words, the jurisdiction embodied in Section 1336 may not be availed of by a district court in a suit instituted under Section 16(2) because such a suit is not one "to

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* Italics added.

enforce, enjoin, suspend, or set aside orders of the Commission".

If, as this Court said in *Mitchell Coal Co.* v. *Penna. R. R. Co.*, 230 U. S. 247, the administrative findings are conclusive in a Section 16(2) suit, it must follow that district courts are without jurisdiction to review such findings and set them aside in Section 16(2) suits. As this Court held, at least inferentially, Section 16(2) is not a review section, but is simply a section under which an action for damages may be maintained. *Lewis, Etc., Co.* v. *Southern Pac. Co.*, 283 U. S. 654.

Section 16(2) does not give a district court jurisdiction to enjoin or set aside an administrative finding of unjustness and unreasonableness. Neither does it provide any procedure by which the Commission and the United States may be brought in as necessary parties. In fact, Congress has expressly withheld authority from the Commission to join as a party plaintiff in suits involving orders for the payment of money. 49 U.S.C. § 16(12). Moreover, without the power in a court of law to enjoin, suspend, or set aside administrative findings of the Commission it cannot be said that review, as that term is used in the Interstate Commerce Act, the Administrative Procedure Act, and the Judicial Code, is available to a party. Those statutes expressly include that element of review; Section 16(2) does not, because by its very language it is not a review section.

The uniformity, which is the principal aim of the Interstate Commerce Act and which is discussed in the *Mitchell* and *Phillips* cases, and many other cases of this Court, cannot be accomplished or assured unless the reviewing court also has jurisdiction to enjoin and set aside the administrative findings which are available to all shippers who have shipped under the condemned rates. Without such jurisdiction a district court can only dismiss the complaint if the administrative findings are held to be invalid or enter judgment if they are upheld. Neither the Commission

nor any other district court would be bound by any judgment entered by a district court.

Moreover, the problems created by the contention that Section 16(2) is a review section are compounded by the fact that the section also authorizes suits to be brought in state courts. That automatically raises serious questions of the dualism of the federal-state system, questions which require no discussion in this brief.

In any event, even if it be conceded, *arguendo,* that a carrier is entitled to limited "review" in a Section 16(2) suit, the fact still remains that, as the lower court pointed out (R. 56), "even 100% success in the § 16(2) suit leaves the carrier faced with unsatisfactory law for all to use, and unsatisfactory fact findings for all shippers to use".

The respondents respectfully submit that Section 16(2) is not a "review" section, much less one "exclusive of all other methods of review". They submit that Section 16(2) is simply a special provision which enables a complainant to initiate a suit for "damages" when a railroad does not comply with a reparation order of the Commission within the period of time fixed therein. They submit that the legislative purpose was "to discourage harassing resistance by a carrier to a reparation order", *St. L. & S. F. R.R.* v. *Spiller,* 275 U. S. 156, "to prevent interposition of *pleas lacking merit* and so *coercively* to bring about prompt payment of the Commission's awards", and "to penalize failure of carriers, *having no defense**, to pay damages in accordance with the terms of the commission's findings and reparation orders". *Baldwin* v. *Milling Co.,* 307 U. S. 478. They submit that it was never the intent of Congress to make Section 16(2) a section under which administrative findings of the Commission and orders based thereon might be reviewed, much less to make it "the exclusive method for review".

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* Italics added.

III.

The Government Arguments Lack Merit

The government concedes (p. 10), as indeed it must, that Section 1336 "does confer jurisdiction over 'any civil action to * * * set aside * * * any order of the Interstate Commerce Commission' ", and that the section "is broad enough in terms to include actions to set aside reparation orders as well as other Commission orders". It argues, however, that "the general words of the statute should not be applied literally to every instance within them, when to do so would work a result inconsistent with the legislative history, purpose and long-standing construction". It argues, as did the Commission in the District Court and the Court of Appeals, that "the exclusive method for review reparation orders is an enforcement proceeding brought by the shipper under Section 16(2)". It contends that is shown by the history of the statutory procedures, by the policies underlying the Interstate Commerce Act, and the understanding of the railroad industry and the federal courts.

That contention is wholly inconsistent with the position taken by the United States in *United States* v. *I.C.C.*, 337 U. S. 426, where it said in its brief (pp. 14-15) to this Court:

> "The Urgent Deficiencies Act confers upon the district courts original jurisdiction 'of cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission."[6]

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[6] This provision first appeared in the Mann-Elkins Act of June 18, 1910 (36 Stat. 539), whereby Congress established the Commerce Court and delineated its jurisdiction. By the terms of the Urgent Deficiencies Act of October 22, 1913 (38 Stat. 208, 219), the Commerce Court was abolished and its jurisdiction was transferred to the district courts without any other substantial change. See *Standard Oil Co.* v. *United States*, 283 U. S. 235, 236-238.

28 U.S.C. 41 (28). That Act further provides that 'The jurisdiction of the district courts * * * shall be invoked by filing * * * a written petition setting forth briefly and succinctly the facts constituting the petitioner's cause of action, and specifying the relief sought.' 28 U.S.C. 45. Section 17(9) of the Interstate Commerce Act provides, without any limitation on the right of any party, that 'any decision, order, or requirement' of the Commission may be reviewed by the courts (49 U.S.C. 17(9)). Thus the jurisdictional statutes here involved place no limitation, in terms, on the right of any party to bring and maintain actions to set aside the Commission's orders."

1. The History Of The Statutory Review And Enforcement Procedures Show That The Exclusive Method For Review Of Administrative Findings And Orders Based Thereon Is In A Proceeding Brought Under Sections 17(9) And 1336.

To begin with, the legislative and interpretive history of Sections 16(2), 17(9) and 1336, as it is set forth in the government brief, is incomplete and inadequate, since it ignores the doctrine of primary jurisdiction, the Congressional mandate expressed in the National Transportation Policy, and for the most part the previous interpretations of those provisions by this Court.

As the government correctly points out (p. 12), under the Acts of 1887, 24 Stat. 379, and 1889, 25 Stat. 855, no order was reviewable upon direct appeal, and the Third Circuit expressly so held as to reparation orders in *Western N. Y. & P. R. Co.* v. *Penn Refining Co.*, 137 Fed. 343, 354 (1905), affirmed 208 U. S. 208. During that period, however, the Commission's findings and order were subject to a right of the rail carriers to a trial *de novo* on all issues, including the administrative finding of unlawfulness of

the tariff rate or regulation. In *Western N. Y. & P. R. Co.* v. *Penn Refining Co., supra,* the court said:

"* * * To undertake to determine whether one, in suing for pecuniary reparation lawfully ordered by the commission, proceeds, on the one hand, for the enforcement of the lawful order of reparation, or, on the other, for the recovery of the reparation lawfully ordered, were to indulge in unprofitable refinement. It is enough for present purposes that in either view the substantial object of the action is the obtaining of reparation lawfully ordered to be paid. The law allows no appeal from a decision of the commission denying or awarding reparation, nor does a writ of error lie in such case. The lawfulness of an order of reparation does not necessarily depend upon a sufficiency of evidence adduced before the commission, but upon the existence of facts, whether or not disclosed to that body, warranting the reparation ordered; and in an action brought to obtain such reparation it is enough that such facts be established by proper evidence. Hence in such an action the parties are not confined to the evidence adduced before the commission during the investigation resulting in the order of reparation. They are at liberty either wholly or partially to rely upon the 'findings of fact,' made by the act prima facie evidence in any judicial proceeding 'as to each and every fact found,' or resort may be had by them or any of them to cumulative or other evidence. *Int. Com. Com.* v. *Alabama Midland Ry.,* 168 U. S. 144, 175, 18 Sup. Ct. 45, 42 L. Ed. 414; *Texas & Pac. Railway* v. *Interstate Com. Com.,* 162 U. S. 184, 196, 16 Sup. Ct. 666, 40 L. Ed. 940; *Kentucky, etc., Co.,* v. *Louisville & N. R. Co.* (C. C.), 37 Fed. 567, 614, 2 L.R.A. 289; *Int. Com. Com.* v. *Lehigh Val. R. Co.* (C. C.), 49 Fed. 177; *Int. Com. Com.* v. *Atchison, etc., R. Co.* (C. C.), 50 Fed. 295; *Int. Com. Com.* v. *East Tenn., etc., Ry. Co.* (C. C.), 85 Fed. 107, 110; *Int. Com.*

Com. v. *Cin., etc, Ry. Co.* (C. C.), 56 Fed. 925. The cause of action is examined de novo and the proceeding is in a qualified sense independent of the investigation by the commission. *Detroit, etc., Ry. Co.* v. *Int. Com. Com.*, 74 Fed. 803, 839, 21 C.C.A. 103; *Kentucky, etc., Co.* v. *Louisville & N. R. Co.* (C. C.), 37 Fed. 567, 615, 2 L.R.A. 289; *Shinkle, Wilson & Kreis Co.* v. *Louisville & N. R. Co.* (C. C.), 62 Fed. 690, 693; *Int. Com. Com.* v. *Cin., etc., Ry. Co.* (C. C.), 56 Fed. 925."

Thus, the findings and order sought to be enforced had only *prima facie* effect in the true meaning of the words.

"Prima facie" in Section 16(2) has long since had a different meaning. According to the decisions of this Court in *Mitchell Coal Co.* v. *Penna. R.R. Co.*, 230 U. S. 247, and *Phillips* v. *Grand Trunk Ry.*, 236 U. S. 662, the administrative findings of the Commission are "conclusive" in a Section 16(2) or a Section 9 action, not merely *prima facie* correct.

The doctrine of primary jurisdiction is the result not of narrow technicalities of statutory construction of specific provisions of the Act, but rather the result of careful consideration of the Act in its entirety with a view toward accomplishing its principal purpose, namely, the promotion of uniformity and equality of rates and the elimination of unjust discrimination and undue preference or advantage. This purpose is now spelled out in the National Transportation Policy, which expressly mandates that "all of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy".

This doctrine was first announced in *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426 (1907), wherein it was held that a shipper seeking reparation predicated upon the unreasonableness of an established rate must primarily invoke redress through the Interstate Commerce Commission, which body alone is vested with power originally to

deal with questions involving the justness and reasonableness of established rates.

The doctrine was thereafter applied by this Court in *Phillips* v. *Grand Trunk Ry.*, 236 U. S. 662, 665, to a situation where the Commission's jurisdiction had already been invoked, the administrative finding being that the assailed rates were and are unjust and unreasonable, and a shipper not a party to the Commission proceeding relied upon that finding in an action for damages brought under Section 9 of the Act.

In *Mitchell Coal Co.* v. *Penna. R.R. Co.*, 230 U. S. 247, this Court discussed the doctrine in connection with the provisions of Section 16(2), stating that the administrative finding in such an action is conclusive in order that the finding may be given general and uniform effect.

Thus, under the theory which forms the basis for the primary jurisdiction doctrine, administrative findings of the Commission are conclusive and binding upon a court in actions instituted under Sections 16(2) and 9, the reason being that if the finding is not given uniform effect neither will the rate be given uniform effect. The only way the validity of those findings may be tested is in review actions brought under the provisions of Section 17(9) and Section 1336.

The Hepburn Act of 1906, 34 Stat. 592, for the first time provided for the direct review of Commission orders. Section 5 thereof expressly authorized the bringing of suits against the Commission to enjoin, set aside, annul or suspend *any order* or requirement of the Commission. The same all inclusive "any order" provision appears in the Mann-Elkins Act of 1910, 36 Stat. 539, 555, which created the Commerce Court, in the Urgent Deficiencies Act of 1913, 38 Stat. 219, which abolished the Commerce Court and transferred its jurisdiction to the district courts, in the Transportation Act of 1940, 54 Stat. 899, which added Section 17(9) to the Interstate Commerce Act and the 1948

Revised Judicial Code, 62 Stat. 931. Moreover, the statutes themselves reveal that when Congress intended to qualify the type of order referred to in any given instance it did so in clear langauge. It did so with respect to the type of order reviewable before a three-judge statutory court [28 U.S.C. § 2321], and with respect to the type of order which the Commission itself was given authority to enforce [49 U.S.C. § 16(12)]. Notwithstanding that legislative history, the government now asks this Court to read into the language of Sections 17(9) and 1336 the words "other than for the payment of money", and that despite the fact that this Court has already declined to do so on two occasions, first in *United States* v. *I.C.C.*, 337 U. S. 426, and then again in *Pennsylvania R. Co.* v. *U. S.* 363 U. S. 202. Significantly, in both instances the United States took the position that the words "any order" meant just that.

Throughout the portion of its argument dealing with the history of the statutory review and enforcement procedures, the government continually speaks of "self-executing orders" by which it presumably means orders which under the provisions of Section 16(12) can be enforced by the Commission itself. If that is what is meant by "self-executing orders", the government contention appears to be that only orders which are enforceable by the Commission itself are reviewable under the provisions of Sections 17(9) and 1336. However, that test of reviewability was clearly rejected in *Rochester Tel. Corp.* v. *U. S.*, 307 U. S. 125, where this Court evolved two specific doctrines limiting the judicial review of Interestate Commerce Commission orders, one "the primary jurisdiction doctrine", firmly established in *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, the other "the doctrine of administrative finality". There, in discussing its decision in *Proctor & Gamble Co.* v. *U. S.*, 225 U. S. 282, this Court said:

> "Finally, the shipper was within the express language of Congress authorizing suits 'to enjoin, set aside,

annul, . . . any order of the Interstate Commerce Commission.' To be sure, the opinion in the *Procter & Gamble* case partly yielded to the Government's main contention in that case that the jurisdictional statute only applied where the order complained of was one which was to be enforced by the Commission. More recent decisions of this Court, however, have dispensed with this requisite for review, citing *Chicago Junction Case,* 264 U. S. 258; *Venner* v. *Michigan Central R. Co.,* 271 U. S. 127; *Colorado* v. *United States,* 271 U. S. 153; *Claiborne-Annapolis Ferry Co.* v. *United States,* 285 U. S. 382; *United States* v. *Idaho,* 298 U. S. 105." (p. 136)

Moreover, in its brief to this Court in *United States* v. *I.C.C.,* 337 U. S. 426, the United States contended that the order there involved, which certainly was not a "self-executing order", was "subject to review under the 'proper application of the combined doctrines of primary jurisdiction and administrative finality,' the test established by this Court 'as a touchstone of jurisdiction to review the Commission's orders,' in *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 142, 143". In upholding the government's contention, this Court said:

> "Third. 28 U.S.C. (1946 ed.) § 41(28) provides that 'The district courts shall have original jurisdiction • • • Of cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission.' The legal consequences of this order if upheld will finally relieve the railroad of any obligations to the Government on account of the alleged unlawful charges; the order thus falls squarely within the type made subject to judicial review by § 41(28). *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 131-132, 142-143; *El Dorado Oil Works* v. *United States,* 328 U. S. 12, 18-19." (pp. 432-433)

Neither was the order under review in *Pennsylvania R. Co.* v. *U. S.*, 363 U. S. 202, a "self-executing" order. Actually, the "order" there under review was a finding by the Commission in *United States* v. *Penna. R. Co.*, 305 I.C.C. 259, 265, that the charges based on domestic rates on certain shipments were unjust and unreasonable. In its decision, this Court said:

> "We decided some years ago that while a mere 'abstract declaration' on some issue by the Commission may not be judicially reviewable, an order that determines a 'right or obligation' so that 'legal consequences' will flow from it is reviewable. *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 131, 132, 143. The record shows that the Commission order here meets this standard. The Commission found that the Railroad's domestic rates were 'unreasonable' as to 62 shipments. This order is by no means a mere 'advisory opinion,' its 'legal consequences' are obvious, for if valid it forecloses the 'right' of the Railroad to recover its domestic rates on those shipments. We have held that judicial review is equally available whether a Commission order relates to past or future rates, or whether its proceeding follows referral by a court or originates with the Commission. *El Dorado Oil Works* v. *United States,* 328 U. S. 12."

and, speaking of jurisdiction to review, said:

> "That jurisdiction is vested exclusively in the District Courts. 28 U.S.C. § 1336, 49 U.S.C. § 17(9). See *Seaboard Air Line R. Co.* v. *Daniel,* 333 U. S. 118, 122. Moreover, this order is properly reviewable by a one-judge rather than a three-judge District Court because it is essentially one 'for the payment of money' within the terms of 28 U.S.C. §§ 2321 and 2325, which exempt such orders from the three-judge procedure of 28 U.S.C. § 2284. *United States* v. *Interstate Commerce Comm'n,* 337 U. S. 426, 441, 443."

Throughout its argument the government contends that Section 16(2) provides "the exclusive method for review of reparation orders", but it does not explain what it means by the term "review". Only three possibilities occur to the respondents.

The first is review within the meaning of Sections 17(9) and 1336, but that can have no application here because those provisions expressly confer power upon the district courts to set aside administrative findings and enjoin the Commission from enforcing them. Section 16(2) confers no such power upon the district courts. Neither does it provide any procedure by which the Commission and the United States may be brought in as necessary parties. In fact, Congress has expressly withheld authority from the Commission to join as a party plaintiff in suits involving orders for the payment of money. 49 U.S.C. § 16(12). Moreover, Section 16(2) authorizes suits to be brought in state courts, and the dualism of the federal-state system militates against any interpretation which holds that a state court has jurisdiction not only to "review" a federal administrative agency's determination but also to set it aside and enjoin its enforcement.

The second possibility is review in the sense that the carrier has a right to a trial *de novo* with respect to the administrative finding of unlawfulness. That interpretation conflicts squarely with the well settled doctrine of primary jurisdiction. *Mitchell Coal Co.* v. *Penna. R. R. Co.*, 230 U. S. 247 and *Phillips* v. *Grand Trunk Ry.*, 236 U. S. 662, have in effect ruled out a trial *de novo*.

The third possibility is review in the sense that the Court may examine the record before the Commission to determine whether or not the administrative finding is supported by substantial evidence on the record considered as a whole, and is otherwise in accordance with the law. This interpretation must be considered in the light of the district court's authority in a Section 16(2) suit. Since the statute does

not give it the power to set aside the administrative findings and enjoin their "enforcement", the district court can only dismiss the complaint if the administrative findings are held to be invalid or enter judgment if they are upheld. Neither the Commission nor any other district court would be bound by any judgment so entered. This interpretation is untenable because it militates against uniform treatment of shippers, rate-wise and service-wise, which is the principal aim of the Interstate Commerce Act, and which is discussed in and forms the basis for this Court's pronouncements made in the *Mitchell* and *Phillips* cases. In short, this interpretation, like the second, is governed by the pronouncement in the *Mitchell Coal* case that administrative findings in Section 16(2) suits are "conclusive", a pronouncement which is compelled by the Act's principal aim to treat all shippers uniformly. Moreover, this interpreation, like the first, cannot be supported by the language of Section 16(2) or its legislative history, and the government has made no attempt to do so.

As far back as 1911, in *Southern Ry. Co.* v. *United States*, 193 Fed. 664, the jurisdiction of the courts to annul reparation orders was upheld. In answering in the affirmative the question as to its jurisdiction to entertain such a suit under the Mann-Elkins Act, the Commerce Court said at pages 665 and 666:

> "The language which defines an order which may be affected by decree of this court is unrestricted; 'any order' which is involved in a direct suit to enjoin, set aside, annul, or suspend, provided always it is a case where a Circuit Court formerly possessed jurisdiction to annul, set aside, or suspend. And that prior to June 18, 1910, the Circuit Courts had jurisdiction is evident, for the language of section 16 of the interstate commerce act, as amended by the Hepburn Act of June 29, 1906, expressly vested in such courts power to hear and determine suits to enjoin, set aside, annul, or suspend *any* order of the Commission. *We cannot*

read into the clause which confers jurisdiction upon this court words of limitation other than those which formerly circumscribed the powers of the Circuit Courts, nor can we except from the described kinds of cases where injunction, annulment, or suspension may be had orders for the payment of money. The fundamental principle that Congress is presumed to have expressed its meaning with due deliberation, and that it is not within the power of the Court to go beyond the plain expressions of the Legislature, prevents the court from holding otherwise.

"We need go no further now than to hold that since the approval of the act creating this court, *a carrier which is ordered to pay damages, and which could have gone to the Circuit Court in equity to have such an order annulled or enjoined, has now the right to ask this court to enjoin or annul or suspend such an order,* provided always it can show grounds for equitable relief. And as the jurisdiction of this court over such a case is exclusive, it follows that no other court can entertain a bill in equity for the direct purposes of annulment or suspension as aforesaid." (Italics supplied)

And further at page 666:

"We are urged to adopt the view that when Congress excepted from the kinds of cases over which the Commerce Court may exercise jurisdiction the enforcement of an order for the payment of money, it could not have intended to authorize us to annul such an order; and it is said that when the Circuit Court tries an action at law to enforce such an order, that court necessarily has power to deny relief, on the ground that the order is illegal and void, and that therefore there is a destruction of that clause of the act which makes the jurisdiction of this court exclusive over cases to annul any order of the Commission.

> The difficulty with this reasoning lies in confounding these two propositions: On the one hand, an express affirmative denial of power to this court to try an action sounding in tort as does one to recover damage for excesses of rates collected as ordered by the Commission, wherein right of trial by jury must be preserved; and, on the other hand, *an express grant to this court of exclusive authority to hear and decide a petition brought to annul or enjoin an order of the Commission.*" (Italics supplied)

And concluded at pages 666 and 667:

> "The case in the Circuit Court is one to recover damages upon an order duly made by the Commission. True, a defense, among others available, may involve the validity of the order upon which plaintiff bases his action; but we need not dwell upon what questions may be presented in the Circuit Court, for we have no jurisdiction over them. It is plain, however, that *if such a defense is sustained in the Circuit Court, the ruling does not thereby affirmatively annul and set aside the order of the Commission; it merely determines that as between the parties before it the order is not a valid legal basis for the particular claim sought to be enforced.* In actual practice, where law and equity courts are invoked, there may arise some opportunity for varying views upon the validity of an order of the Commission. Surely, though, instances of divergencies will not happen more often than they do under any system where separation of law and equity obtains, *and in any event are not of such serious apprehension as to justify a construction of the statute which would subtract from the lawful authority deliberately conferred by Congress upon this court exclusively to enjoin, set aside, annul, or suspend, in whole or in part, 'any order' of the Commission.*" (Italics supplied)

The government attempts to minimize the importance of that decision by stating (p. 15) that it could not be appealed because it was dismissed on motion of the railroad. However, in *St. Louis & O'Fallon R. R.* v. *United States*, 279 U. S. 461 (1929), this Court expressly approved the distinction drawn by the Commerce Court between its jurisdiction to *enforce* an order of the Commission and its jurisdiction to *enjoin, set aside, or annul* such an order. The question in the *O'Fallon Case* was whether this Court had power by direct appeal to review the action of the lower court in a suit to *set aside* an order of the Commission which required the payment of money to the Commission under the recapture provisions of Section 15(a) of the Interstate Commerce Act. In holding that the suit to *set aside* the Commission's order directing the payment of money could be entertained by a three-judge district court and reviewed by this Court on direct appeal, the Court said:

> "The cause is properly here under the Judicial Code, as amended by Act of February 13, 1925 (U.S.C. Title 28, § 345)—
>
> 'Sec. 238. A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following Acts or parts of Acts and not otherwise: . . .
>
> '(4) So much of "An Act making appropriations . . . for the fiscal year 1913, and for other purposes", approved October 22, 1913, as relates to the review of interlocutory and final judgments and decrees in suits to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money . . .'
>
> "The Act of October 22, 1913 (38 Stat. 219, 220), transferred to district courts the jurisdiction granted to the Commerce Court by Act of June 18, 1910 (36 Stat. 539); and provided for review by this court of

causes embraced therein. The jurisdiction of the Commerce Court included—

> 'First. All cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money.
>
> 'Second. Cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission . . .'

"Paragraph (4), sec. 238, applies to all those causes formerly cognizable by the Commerce Court and reviewable here. The words 'other than for the payment of money' were taken from clause First, Act of 1910, above quoted and, as there, they delimit the trial court's jurisdiction. They do not inhibit review here of any cause formerly cognizable by the Commerce Court. Moreover, the order under consideration was not merely for payment of money; and the proceeding below was to *set aside*, not to enforce it." (pp. 481-482) (Italics supplied.)

In pointing out the distinction, from a jurisdictional standpoint, between a proceeding to *set aside* an order of the Commission for the payment of money and a proceeding to *enforce* such an order, this Court followed the plain meaning of the language empowering the district courts to set aside *any* order of the Commission and applied precisely the same construction to that language as the Commerce Court placed upon it in the *Southern Railway Case*.

These specific holdings by the Supreme Court and by the Commerce Court that the district courts have original jurisdiction, based on the statute, of suits to enjoin, set aside, or annul orders of the Commission requiring the payment of money are not opposed by any judicial decision.

As the United States successfully contended at pages 14-15 of the brief filed on its behalf in *United States* v. *I.C.C.*, 337 U. S. 426, Section 17(9) provides "without any limitation on the right of any party, that 'any decision, order, or requirement' of the Commission may be reviewed by the courts" and Section 1336 confers upon the district courts original jurisdiction "of cases brought to enjoin, set aside, annul, or suspend in whole or in part any orders of the Interstate Commerce Commission".

Having there argued that Sections 17(9) and 1336 "place no limitation, in terms, on the right of any party to bring and maintain actions to set aside the Commission's orders", the present contention of the government that those sections do not authorize review of administrative findings and reparation orders based thereon is entitled to little or no consideration.

For the reasons hereinbefore given, the respondents respectfully submit that the history of the statutory review and enforcement procedures does not show that "the exclusive method for review of reparation orders is in an enforcement proceeding brought by a shipper under the provisions of Section 16(2)". On the contrary, they submit that the history of the statutory review and enforcement procedures show that the exclusive method for the review of "any order" is in an action brought under the provisions of Sections 17(9) and 1336.

2. The Policies Underlying The Interstate Commerce Act Do Not Support The Conclusion That The Exclusive Method For Review Of Reparation Orders Is In An Enforcement Proceeding Brought By The Shipper Under Section 16(2).

The government argues (p. 30) that the policies underlying the statute strongly support its conclusion that "the exclusive method for review of reparation orders is in an enforcement proceeding brought by the shipper under Section 16(2)". It contends that if railroads can sue to set

aside reparation orders, shippers will be placed at a serious disadvantage, that the Commission will be obliged to litigate numerous cases involving relatively minor issues, and that railroad suits to set aside reparation orders cannot be justified on other policy grounds.

(A) *Shippers Will Not Be Placed At a Serious Disadvantage.*

The government argues that in suits involving orders other than those for the payment of money the shipper has the option of intervening in support of the order or leaving the Commission to enforce its own order. It argues that in the case of an order for the payment of money only the shipper "can sue to enforce it", and that the only compensating benefits the shipper receives under Section 16(2) are a broad choice of venue, relief from court costs, except on his own appeals, and payment of attorney fees. The government argues that in a railroad suit to set aside a reparation order a shipper not only loses a choice of venue but may incur increased litigation costs and attorney fees.

The error in that contention is basic and clearly apparent. If the findings and order of the Commission are invalid as a matter of law, no shipper has any rights thereunder or is entitled to any of the "advantages" referred to. Only if the findings and order of the Commission are valid does a shipper have a valid cause of action for damages under Section 16(2) and a right to the procedural advantages provided therein. If the district court upholds the Commission's findings and order in a Section 17(9) suit by a carrier, the shipper is not denied his right to maintain an action under Section 16(2), nor deprived of any of its procedural advantages. On the other hand, if the reviewing court holds the Commission findings and order invalid and sets them aside, it automatically means that the shipper did not have a valid cause of action under Section 16(2) to begin with and, therefore, was neither

entitled to nor deprived of any procedural advantage. Moreover, as the decision of the lower court makes clear, under appropriate circumstances a shipper may obtain the benefit of all or part of those statutory advantages by intervening in the Section 17(9) suit. That is exactly what a number of successful shippers have done in *Baltimore and Ohio R. Co., et al.* v. *United States, et al.*, Civil Action No. 14897, D. Md., one of the suits referred to by the petitioner (p. 6). That suit seeks review of the administrative findings and orders of the Commission in 18 or 19 individual proceedings involving at least that many shippers or receivers located at various points throughout the United States who made shipments of various commodities from various origins to various destinations throughout the United States. The individual proceedings were consolidated by the Commission for disposition in one single report. A number of the complainants before the Commission have intervened in that court action on the side of the Commission and the United States, and at least two of them in addition to intervening on the side of the defendants have counter-claimed seeking "damages" under the provisions of Section 16(2).

As the United States stated in its answer to the instant complaint, "the shipper, if it so elects, may present its position through its own counsel". As the court below pointed out (R. 59), a decree sustaining the basic validity of the findings and order of the Commission would leave interested shippers in an even more advantageous position, since the only remaining issue in a Section 16(2) suit would be the limited issue of money damages, an issue which the railroads then would hardly be in a position to challenge. If the findings and order of the Commission fail to pass muster and are, therefore, "not in accordance with law", they may be set aside, and, as the lower court said (R. 58), "no one, whether Carrier or Shipper, will thereafter be subjected to the expense of useless litigation in numerous courts where separate § 16(2) shipper suits have been filed".

In deploring "the shipper's loss of his choice of venue" (p. 7), the petitioner overlooks the simple fact that if a shipper has a valid cause of action for damages under Section 16(2) he is at liberty to file his suit and avail himself of all of the procedural advantages provided for in that section, including "his choice of venue". Moreover, the venue provisions of Section 1398 are much narrower than those of Section 16(2), and are the identical venue provisions available to a shipper seeking judicial review of a Commission order denying an award of reparation.

(B) *The Commission Is The Proper Party Defendant In Suits Involving Its Own Orders.*

The government contends (p. 36) that Congress has made shippers, not the Commission, responsible for the "enforcement" of Commission orders, many of which would involve "minor issues limited to particular shippers which would be more appropriately litigated by the shippers themselves". That contention overlooks or ignores the basic distinction between a suit for "damages" under Section 16(2) and a suit to enjoin, annul or set aside the administrative findings and order of the Commission in any proceeding, whether it happens to involve reparation or not. Moreover, as the Court very aptly stated in *Malone Freight Lines, Inc.* v. *United States,* 204 F. Supp. 745, 754, "Many orders which might be termed minor by the Commission would undoubtedly be viewed as major by the aggrieved carrier". Many administrative findings and reparation awards seemingly minor when made thereafter become major because of a precedent established thereby, or because the administrative findings are sought to be applied in other cases.* In any event, it is clear that the

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* In *Harrison Construction Co.* v. *Pennsylvania R. Co.,* 280 I.C.C. 279, decided February 19, 1951, and *Grafton Coal Co.* v. *Baltimore & O. R. Co.,* 280 I.C.C. 435, decided March 21, 1951, the Commission found the charges assessed on ten carloads of motor

(Footnote continued on following page)

Commission is a proper party defendant in suits seeking to set aside orders of the Commission *denying* reparation, orders which from the government point of view undoubtedly likewise involve "minor issues limited to particular shippers". That being so, the respondents are completely at a loss to understand the apparent indignation of the government at the very thought that the Commission should be expected to defend its own administrative findings and orders *granting* reparation. Who, if not the Commission, should have the primary responsibility of defending its administrative findings and orders, and who is in as good a position or as well qualified to do so? As the lower court points out (R. 59) in a suit by a shipper under Section 16(2) "the sole spokesman in behalf of the ICC's order is the private party seeking partisan relief", whereas in a suit brought under the provisions of Sections 17(9), 1336, and 1398, the United States and the Commission are made defendants "directly and immediately responsible for * * * the advocative assertion of contentions deemed essential in the public interest".

(Footnote continued from preceding page)

vehicles shipped from two specific origins to two specific destinations between March and June, 1946, unjust and unreasonable and awarded reparation. Years later the United States made a post audit of freight bills covering shipments of motor vehicles made during the period from 1941 to 1946, from and to points throughout the United States other than those involved in the cited proceedings. Thereafter the General Accounting Office arbitrarily made deductions from railroad accounts aggregating millions of dollars on those shipments. Following prolonged further proceedings before the Commission, its prior findings were reversed in *Harrison Construction Co.* v. *Pennsylvania R. Co.*, 311 I.C.C. 521, decided November 7, 1960, and the charges on the ten carloads were found not shown to have been unjust or unreasonable. In *United States* v. *I.C.C.*, 221 F. Supp. 584 (1964), in an action brought by the Government under the provisions of Sections 17(9), 1336, 1398, and 1009, the court refused to set aside the report and order of the Commission, and granted a motion by the Commission and the intervening railroad defendants for summary judgment.

(C) *Suits By Railroads To Set Aside Reparation Orders Can Be Justified On Policy Grounds.*

The government argues (p. 36) that railroad suits to set aside reparation orders cannot be justified on policy grounds (1) because this Court's holding in *United States* v. *I.C.C.*, 337 U. S. 426, "was premised on the ground that no other mode of judicial review existed", and (2) because, contrary to the view of the Court of Appeals that unless a railroad can sue to set aside the findings and order of the Commission in a reparation proceeding it might be subject to a multiplicity of suits brought by shippers in different courts, "it is not clear that permitting railroads to attack reparation orders would decrease or increase the amount of litigation".

The answer to that contention is obvious.

Here again, no other mode of judicial review exists since Section 16(2) is not a "review" section. The order here under review, if upheld, will be followed by legal consequences, and thus falls squarely within the type made subject to judicial review. *Rochester Tel. Corp.* v. *U. S.*, 307 U. S. 125, 132; *United States* v. *I.C.C.*, 337 U. S. 426, 432. In any event, there is nothing in the language of this Court in that decision which purports to hold, as the government implies, that the exclusive method for review of reparation orders is in an enforcement proceeding brought by the Commission under Section 16(2), or is in conflict with the contention of the respondents.

Commenting on the "suggestion" of the Court of Appeals (R. 56) that railroads might be subjected to a multiplicity of suits brought by shippers in different courts, and conceding that to be a fact (p. 39), the government argues that "a multiplicity of suits might also result if several railroads were ordered to pay reparations to a single shipper and each were allowed to bring suit to set aside the order,

whereas only one suit to enforce the order could be brought". That argument overlooks or ignores the basic fact conceded by the government that "all other shippers similarly situated may sue on the orders under Section 16(2)". Even though such orders were made for the benefit of "a single shipper", any suit to set aside the Commission order would necessarily name the United States and the Commission as defendants, not the "single shipper" or "all other shippers". Obviously the lower court was more concerned with insuring uniform treatment of all shippers similarly situated than it was with the multiplicity of suits aspect.

Nor is there any basis for the contention (p. 39) that "each time a railroad sues to set aside a reparation order and loses, an additional action must still be brought by the shipper to enforce the order". It is highly unlikely that any railroad which failed in an action to set aside a reparation order in a judicial review proceeding would nevertheless subject itself to inevitable further failure in a Section 16(2) proceeding with the added result that it would thereby subject itself to the payment of costs and an attorney's fee.

In any event, railroad suits to set aside reparation orders are justified on grounds of policy. The very uniformity which is the principal aim of the Interstate Commerce Act, and which is discussed in the *Mitchell* and *Phillips* cases and many other decisions by this Court, cannot possibly be assured unless the reviewing court which finds the administrative findings and orders of the Commission in reparation proceedings invalid has jurisdiction to enjoin and set aside those findings and orders which otherwise remain available to "all other shippers similarly situated". Without such jurisdiction a district court or state court do no more than give judgment for the plaintiff or defendant.

3. The Understanding Of The Railroad Industry And Of The Federal Courts Does Not Support The Conclusion That The Exclusive Method For Review Of Reparation Orders Is In An Enforcement Proceeding.

The final contention of the Goverment is that the understanding of the railroad industry and of the federal courts supports the conclusion that "the exclusive method for review of reparation orders is in an enforcement proceeding". That contention overlooks or ignores the important fact that this Court had not definitively held that judicial review of Commission "determinations" involving the payment of money was proper until *El Dorado Oil Works* v. *United States,* 328 U. S. 12, *United States* v. *I.C.C.,* 337 U. S. 426, and *Pennsylvania R. Co.* v. *United States,* 363 U. S. 202, decided 18, 15, and 4 years ago, respectively. Certainly there is nothing in the language of Section 17(9) or 1336 authorizing the application of those provisions where the Commission denies reparation to a shipper or receiver, or where it makes an administrative finding in a referral case, which does not likewise authorize the application of those provisions when the Commission makes an administrative finding and issues a reparation order based thereon. To hold otherwise would be completely illogical and unreasonable.

The government relies upon two cases in which the federal courts refused to entertain suits to set aside reparation orders on the alleged ground that such actions could not be brought. The first of those cases is *Pittsburgh & W. V. Ry. Co.* v. *United States,* 6 Fed. 2d 646, in which a three-judge court found the petition there under consideration failed to disclose equity and dismissed the complaint, but not "on the ground that an action cannot be brought to set aside a reparation order". As that court noted (p. 648), the petitioners therein invoked "the general equity jurisdiction of this court (as distinguished from its statutory jurisdiction with respect to matters arising before the Interstate Commerce Commission)", and on the sole ground

that the order there assailed, unless enjoined, set aside and annulled, would result in a multiplicity of suits. However, that case was decided in 1924, more than 16 years prior to the enactment of Section 17(9), and long before the decisions of this Court in *Rochester Tel. Corp.* v. *U. S.*, 307 U. S. 125, *El Dorado Oil Works* v. *U. S.*, 328 U. S. 12, *United States* v. *I.C.C.*, 337 U. S. 426, and *Pennsylvania R. Co.* v. *U. S.*, 363 U. S. 202.

The second case relied upon is *Baltimore & O. R. Co.* v. *United States*, 12 F. Supp. 261, a suit in equity before a three-judge court. The primary purpose of that action was to have Commission orders requiring the establishment of rates for the future set aside. The suit did ask the court "to review the reparation orders, as well as the rate orders", but the court refused to do so, again not on the ground that an action cannot be brought to set aside a reparation order, but on the ground (p. 263) that its jurisdiction as a specially constituted statutory court to review reparation orders was denied. Like the first case cited by the government, that case was decided prior to the enactment of Section 17(9), and prior to the decisions of this Court in *Rochester Tel. Corp.* v. *U. S.*, 307 U. S. 125; *El Dorado Oil Works* v. *U. S.*, 328 U. S. 121; *United States* v. *I.C.C.*, 337 U. S. 426; and *Pennsylvania R. Co.* v. *U. S.*, 363 U. S. 202.

The government also relies on two decisions of this Court, *United States* v. *I.C.C.*, 337 U. S. 426, and *Porter Co.* v. *Central Vermont R. Co.*, 366 U. S. 272, in support of its contention that the courts "have assumed that Section 16(2) is the sole method for review of reparation orders". The respondents respectfully submit that in neither of those cases is any such assumption or implication to be found. Not a single word in *United States* v. *I.C.C., supra,* implies that such review is available "only" in an enforcement proceeding brought by the shipper under Section 16(2). Nor does it avail the government anything

to point out (p. 41) that "the dissenting Justices concluded that Section 16 is the sole basis of review for reparation orders and that the provision for suits to set aside Commission orders did not apply to orders denying reparations". It is highly significant that even Mr. Justice Frankfurter, the author of that dissent, joined in the unanimous opinion in *Pennsylvania* v. *United States,* 363 U. S. 202, which, of course, was in direct conflict with the conclusion of the dissenting justices in *United States* v. *I.C.C.,* 337 U. S. 426.

Finally, the government refers (p. 42) to *Washington Terminal Co.* v. *Boswell,* 319 U. S. 732. Contrary to the contentions of the government, that case did not involve provisions of the Railway Labor Act "which are closely analogous to Section 16(2)". As the Court of Appeals said (R. 57), "the resemblance is superficial". Under the provisions of the Railway Labor Act, 45 U.S.C.A. §§ 151, 153 First [p], the district courts are empowered to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce *or set aside* the order of the adjustment board. No similar sweeping authority is contained or implied in the provisions of § 16(2). Moreover, the procedure created by the Railway Labor Act is not subject to the provisions of the Administrative Procedure Act, 5 U.S.C.A. §§ 1001, *et seq.* As the lower court pointed out (R. 57), that is not the case here.

The respondents respectfully submit that for the reasons indicated, there is no merit to the contention of the government that the understanding of the railroad industry and of the federal courts supports the conclusion that "the exclusive method for review of reparation orders is in an enforcement proceeding". On the contrary, they submit it is clear that the understanding of the railroad industry and of the federal courts is that the exclusive method for the review of *any order* of the Commission, including a reparation order, is in a suit brought under the provisions of Sections 17(9) and 1336.

Conclusion

The respondents respectfully submit that the Court of Appeals properly concluded that the District Court was correct in overruling the motion to dismiss, in sustaining the right of judicial review in that Court under Sections 1336 and 1398, and in rejecting the contention that review had to be in the Section 16(2) suit pending in New York. They submit that the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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Certificate of Service

I, J. Edgar McDonald, attorney of record for the respondents in this proceeding, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served copies of the foregoing brief on the several parties to this action, as follows:

1. On the petitioner, the Interstate Commerce Commission, by mailing copies in duly addressed envelopes with first class postage prepaid, to its attorneys of record, Robert W. Ginnane, General Counsel, and Leonard S. Goodman, Assistant General Counsel, Interstate Commerce Commission, Washington, D. C. 20423.

2. On the United States of America, by mailing copies in duly addressed envelopes with first class postage prepaid, to its attorneys of record, Archibald Cox, Solicitor General, and Bruce J. Terris, Assistant to the Solicitor General, Department of Justice, Washington, D. C. 20530.

3. On The National Industrial Traffic League, by mailing copies in duly addressed envelopes to its attorneys of record, John F. Donelan and John M. Cleary, 700 Brawner Building, 888 17th Street, N. W., Washington, D. C. 20006.

This 16th day of April, 1965.

J. Edgar McDonald.
466 Lexington Avenue,
New York, N. Y. 10017.

APPENDIX A

Judicial Review

Sec. 10. [*5 U.S.C. § 1009.*] Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) Right of review.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) Form and venue of action.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) Reviewable acts.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(d) Interim relief.—Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

(e) Scope of review.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

APPENDIX B

Answer of the Interstate Commerce Commission

(Title Omitted)

The Interstate Commerce Commission, one of the defendants in the above-entitled action, for answer to the complaint therein filed:

1. Admits the allegations of paragraphs I through IV.

2. Admits the allegations of the first two subparagraphs of paragraph V, denies the allegations of the third subparagraph, and alleges that all shipments involved in this proceeding originated on the Atlantic Coast Line R. Co. at Prairie, Florida, and the other plaintiffs were respectively the delivering carriers on all shipments on which the Commision allowed reparation in the orders appealed to this Court.

3. Admits the allegations of the first two subparagraphs of paragraph VI, and further admits that plaintiffs made the various contentions set forth in the third subparagraph before the Commission.

4. Admits the allegations of paragraph VII, except that defendant denies it disregarded any substantial or material grounds asserted by plaintiffs that might have warranted denying the shipper's requested relief. Defendant Commission alleges that the petitions for reconsideration filed by the railroads were denied by the entire Commission in its orders of July 23, 1958, and May 23, 1961; and further alleges that the parties were heard in oral argument following the further hearing before the examiner, in lieu of filing briefs, as shown in the report of Division 3, 311 I.C.C. 315, of September 28, 1960.

5. Denies the allegations of paragraphs VIII through XIV and of all subparagraphs thereunder.

Except as herein expressly admitted, the defendant denies each and every allegation contained in the complaint.

WHEREFORE, the defendant prays the complaint be dismissed.

APPENDIX C

Answer of the United States of America
(Title Omitted)

Now comes the United States of America, a defendant herein, and in answer to the Complaint says:

I.

This Complaint seeks to set aside certain orders of the Interstate Commerce Commission granting reparations to a shipper found to have been charged unreasonably high rates by the plaintiffs. The Interstate Commerce Commission and the shipper have adequate statutory authority to defend the Commission's orders. [28 U.S.C. § 2323].

II.

The Commission's orders challenged herein involve the same dispute and the same claim for money damages as were involved in the proceedings before the Commission. The Interstate Commerce Commission will avail itself of the statutory authorization to interpose all defenses to the plaintiffs' charges possible of being interposed. The shipper, if it so elects, may present its position through its own counsel. Under these circumstances, and in view of these facts, the United States does not participate in the defense of the Commission's orders but does not oppose them.

Accordingly, the United States neither admits nor denies any allegations of the Complaint.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 14

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

ATLANTIC COAST LINE R. CO., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES AS *AMICUS CURIAE*

In our principal brief in the instant case, and in the Brief for the United States and the Federal Maritime Commission in No. 63, this Term, *Philip R. Consolo* v. *Flota Mercante Grancolombiana, S.A.* (dealing with the same issue in a slightly different context), we argue that a carrier ordered to pay reparations can test the administrative order only in a proceeding instituted by the injured shipper to enforce the reparations award (under Section 16(2) of

the Interstate Commerce Act, in the case of a shipper by rail, and that the carrier may not initiate his own action under 28 U.S.C. 1336—as in the case of other Commission orders—to set aside the reparations order. Our reasoning, to recapitulate briefly, is as follows:

Commission orders prescribing future conduct have generally a continuing significance and substantial public importance. Therefore, they are enforceable by the Commission itself and are reviewable by means of actions to set aside the Commission's order, which are brought in three-judge district courts with a right of direct appeal to the Supreme Court and defended by the Commission. Reparations orders, however, ordinarily lack such general significance. They are limited to adjudicating past practices and assessing the damages sustained by persons injured thereby. Hence, the procedures for judicial review are different. Section 16(2) of the Interstate Commerce Act provides a special procedure for the shipper to enforce a reparations order running in his favor, and the agency is not empowered to enforce such orders at all. In the shipper's enforcement action he receives special procedural advantages: he is given the choice of venue; he will recover costs (save as they may accrue on his appeal); if he prevails, he will be awarded a reasonable attorney's fee; and the burden of proof is shifted to his adversary by a provision that makes the Commission's findings and order in the administrative reparations proceeding *prima facie* evi-

dence in the enforcement action. Moreover, other similarly situated shippers may collect damages under the reparations decision without proceeding first before the Commission.

The theory behind the special treatment accorded reparations orders is apparent. Because they lack the general public interest of other agency orders (as attested by the fact that, where reviewable at all in a suit by the carrier, reparations orders are never heard by a three-judge panel in the district court, as in the case of other orders), the Commission is not intended to be a party to a reparations proceeding at any stage; its function in regard to such a proceeding is merely to provide an expert tribunal to hear and decide an essentially private dispute between shipper and carrier. But, with the Commission thus relieved of any responsibility for enforcing the reparations orders which it issues, the shipper is left alone to bear the burden of enforcement. To make the burden bearable—recognizing that, as a class, shippers are at a disadvantage in litigation with carriers—the statute provides special procedural advantages to the shipper.

In short, the procedural scheme for dealing with reparations orders has two complementary objectives: (1) to relieve the agency of the responsibility of a party, and (2) to give the shipper sufficient procedural advantages to enable him to enforce the reparations order without the help of the agency.

This careful and practical design would be fatally disrupted by granting the carrier the right to sue to set aside the reparations order. It would inject the

agency into the proceedings as a party, because an action under 28 U.S.C. 1336 to set aside a Commission order is brought against the United States and the Commission. Further, unless the agency assumes the full burden of defense in that action, the shipper must intervene and participate fully in the proceeding—where he is entitled to none of the special procedural advantages that Congress deemed necessary to enable him to maintain an enforcement action. If in the direct review proceeding the reparations order is upheld, the shipper must still bring suit to enforce the order; the agency is without jurisdiction to bring an enforcement action with respect to orders of this type. And if the order is set aside in the direct review proceeding, other shippers are thereby foreclosed from making use of it. On the other hand, the carrier loses nothing if required to challenge a reparations order solely by way of defense to the shipper's enforcement action. For he is entitled to receive in that action prompt and complete judicial review of the validity and enforceability of the agency's order.

Respondents reply to our arguments essentially as follows: (1) A reparations order is no mere abstract declaration, but a final administrative order under the doctrine of *Rochester Tel. Corp.* v. *United States*, 307 U.S. 125; therefore, it is subject to judicial review. (2) Section 16(2), however, affords no opportunity for judicial review. It is a damages, not a review, provision. In the shipper's enforcement action under that Section, the administrative finding of illegal conduct by the carrier underlying the repara-

tions order is conclusive. (3) Hence, the carrier is entitled to invoke the direct-review procedure, 28 U.S.C. 1336, as indicated by this Court's decision in *United States* v. *Interstate Commerce Commission*, 337 U.S. 426, a case involving a Commission order denying (rather than, as here, granting) reparations to the shipper.

We grant the first premise of this rebuttal—that an order granting reparations is final and fully ripe for purposes of judicial review. We grant that the carrier is entitled to judicial review of such an order —if not in a Section 16(2) proceeding, then, as *United States* v. *Interstate Commerce Commission* teaches, in an action under 28 U.S.C. 1336. And we grant that, read literally, the language of Section 1336—which speaks of "any order"—is broad enough to embrace reparations orders. But respondents' conclusions do not follow from these premises.

Contrary to respondents' contention, Section 16(2) (as we explain in detail at pages 28-37 of our brief in *Consolo*) is designed to afford the carrier against which a suit to enforce a reparations order is brought a complete opportunity for judicial review of the order. The agency's findings are conclusive in such an action only in the same sense that they would be conclusive in a direct review proceeding as well: insofar as they determine questions within the primary jurisdiction of the Interstate Commerce Commission, they may not be re-examined *de novo* in the judicial action, although they may be reviewed by the court. From the carrier's standpoint, the only difference between judicial review in an enforcement action as

against a direct review action is that in the former the court may invalidate the agency's order only as between the parties and may not set aside the order altogether. But the carrier has no cause to complain. Normally, a judgment is *res judicata* only as between the actual parties to the proceeding and is not binding on non-parties—in this context other shippers—who do not and are not required to participate.

That the carrier has a right to judicial review of the agency's order in the enforcement action disposes of the contention that *United States* v. *Interstate Commerce Commission* justifies or requires that an order granting reparations be reviewable under 28 U.S.C. 1336. There, to be sure, this Court allowed the shipper to bring a Section 1336 action to set aside a Commission order *denying* (not, as here, granting) reparations. But the choice in that case was between judicial review of the agency's order in a Section 1336 proceeding and no judicial review at all. The shipper could not bring an enforcement action—he had no order in his favor to enforce. This Court was required to balance the policy against injecting the agency as a party to a reparations case (the result if the shipper was permitted to sue to set aside the agency's order) against the policy in favor of permitting judicial review of final administrative orders. Here, there is no such hard choice to be made. The policy of allowing judicial review of agency orders may, in the case of an order granting reparations, be fully effectuated by remitting the carrier to defending against the order in the shipper's enforcement action.

This disposition at the same time fully effectuates the policy against injecting the agency as a party to reparations proceedings. Such is the accommodation that we urge here.

Respectfully submitted.

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RICHARD A. POSNER,
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NOVEMBER 1965.

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SUPREME COURT OF THE UNITED STATES

No. 14.—October Term, 1965.

Interstate Commerce Commission, Petitioner, *v.* Atlantic Coast Line R. Co. et al.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[March 22, 1966.]

Mr. Justice White delivered the opinion of the Court.

This case is before the Court for a determination of when and in what proceedings a common carrier by rail may challenge an order of the Interstate Commerce Commission awarding reparations to a shipper claiming injury because of the carrier's violation of the Act.

A shipper, Thomson Phosphate Company, filed a complaint with the Commission alleging that certain rates charged by respondent railroads were unjust and unreasonable and seeking reimbursement of those transportation charges to the extent they were unlawful. Interstate Commerce Act §§ 8 and 9, 49 U. S. C. §§ 8 and 9 (1964 ed.). The Commission sustained the complaint and issued a report finding that the assailed rates were unjust and unreasonable and that the shipper was entitled to reparations. *Thomson Phosphate Co.* v *Atlantic Coast Line R. Co.*, 303 I. C. C. 25 (Div. 2, 1958). When respondents refused to certify the shipper's statements showing the shipments made during the period involved, the Commission reopened the proceeding for a determination of the amount of reparations due. After such additional proceedings, the Commission found Thomson was entitled to reparations of $8,889.76 with interest, and an order was entered authorizing and directing

respondents to pay such sum by a specified date, later amended to August 28, 1961. 311 I. C. C. 315. Respondents refused to comply with the order and brought suit in the United States District Court for the Southern District of Florida under § 17 (9) of the Interstate Commerce Act, 49 U. S. C. § 17 (9), and 28 U. S. C. §§ 1336 and 1398 (1964 ed.) to enjoin, set aside, and annul the orders of the Commission. Respondents claimed, *inter alia*, that the Commission erred in finding the rates unreasonable and in not finding Thomson's claims barred by the Act's limitation provision, Interstate Commerce Act § 16 (3), 49 U. S. C. § 16 (3) (1964 ed.). Thomson, which was not a party to the carriers' action, filed in the Southern District of New York a suit against respondents and other railroads to enforce the Commission's reparation award pursuant to § 16 (2) of the Interstate Commerce Act, 49 U. S. C. § 16 (2) (1964 ed.). By stipulation, the New York case has been held in abeyance pending the outcome of the Florida case, which is presently before this Court.

The Commission moved to dismiss the carriers' injunction action, contending that reparation orders are not reviewable in such a suit and that the carriers were required to await the shipper's enforcement action to attack the Commission's order. The Florida District Court denied the motion to dismiss and, on the merits, held that Thomson's claims were barred by limitations. 213 F. Supp. 199. The sole issue raised on appeal was whether the District Court had jurisdiction. The Court of Appeals affirmed, sustaining the jurisdiction of the Florida District Court. 334 F. 2d 46. We granted certiorari because of the importance of this question in the administration of the Act. 379 U. S. 957. We reverse and hold that when the Commission issues a reparation order, not accompanied by a cease-and-desist order, a carrier may obtain review of the Commission's order

only in the court where the shipper commences its enforcement action—or where the shipper seeks review of the Commission's order, see *Consolo* v. *Federal Maritime Commission, post.*

I.

The Interstate Commerce Act contains detailed provisions governing the presentation and adjudication of claims for reparations. Section 8 is the basic provision creating liability and declares that any common carrier by rail which violates the Act "shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation . . . ." By § 9, the complainant is given the alternatives of seeking such damages by complaint to the Commission, under the procedures established by § 13 (1), or of bringing suit in a federal district court. But the primary jurisdiction doctrine requires initial submission to the Commission of questions that raise "issues of transportation policy which ought to be considered by the Commission in the interests of a uniform and expert administration of the regulatory scheme laid down by [the] Act." *United States* v. *Western Pac. R. Co.*, 352 U. S. 59, 65; *Texas & Pac. R. Co.* v. *American Tie & Timber Co.*, 234 U. S. 138. Accordingly, a shipper who commences his § 9 reparation proceeding in the District Court will nevertheless be required to repair to the Commission for decision of issues, like the reasonableness of rates, which call the primary jurisdiction doctrine into play. When that occurs, the court ordering the reference of such issues to the Commission has exclusive jurisdiction of any civil action to enforce, enjoin, set aside, or annul a Commission order arising out of the referral, 28 U. S. C. § 1336 (b) (1964 ed.), such action to be brought within 90 days of the entry of the Commission's final order, 28 U. S. C. § 1336 (c) (1964 ed).

Our concern here, however, is with the alternative procedure provided in § 9, which involves an initial complaint before the Commission and culminates in the § 16 (2) suit to enforce the Commission's reparation award. Section 16 (1) provides that if the Commission determines the complainant is entitled to reparations it "shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named." If the carrier fails to comply with the order by the designated time, the shipper then has the right under § 16 (2) to file suit in either federal or state court to enforce the Commission's reparation award. Moreover, Congress has provided that in such a suit the shipper is to have certain procedural advantages designed to discourage "harassing resistance by a carrier to [the] reparation order." *St. Louis & S. F. R. Co.* v. *Spiller*, 275 U. S. 156, 159; see also *Meeker & Co.* v. *Lehigh Valley R. Co.*, 236 U. S. 412, 433; *Baldwin* v. *Milling Co.*, 307 U. S. 478. The shipper has a broad choice of venue. If the suit is brought in a federal court, see *Lewis-Simas-Jones Co.* v. *Southern Pac. Co.*, 283 U. S. 654, 661, the shipper is free from liability for costs, except as they accrue on its appeal, and it may introduce at trial the findings and order of the Commission, which "shall be prima facie evidence of the facts therein stated . . . ." In addition, the shipper is to be allowed a reasonable attorney's fee if it prevails, an advantage also accorded under § 8 to shippers who elect to proceed in court in the first instance.[1]

---

[1] The relevant text of the provisions discussed in text above reads as follows:

"§ 8. Liability in damages to persons injured by violation of law.

"In case any common carrier subject to the provisions of this chapter shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter

The Interstate Commerce Act likewise contains general provision for judicial review of Commission orders. Section 17 (9) provides that after an application for rehearing, reargument, or reconsideration has been denied

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required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

"§ 9. Remedies of persons damaged; election; witnesses.

"Any person or persons claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter in any district court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. . . .

. . . . .

"§ 13. Complaints to and investigations by Commission.

"(1) Complaint to Commission of violation of law by carrier; reparation; investigation.

"Any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any

or otherwise disposed of, a suit may be brought to enforce, enjoin, suspend, or set aside the Commission decision, order or requirement.[2]

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reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

. . . . . .

"§ 16. Orders of Commission and enforcement thereof.

"(1) Award of damages.

"If, after hearing on a complaint made as provided in section 13 of this title, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this chapter for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

"(2) Proceedings in courts to enforce orders; costs; attorney's fee.

"If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the district court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any State court of general jurisdiction having jurisdiction of the parties, a complaint setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated, and except that the plaintiff shall not be liable for costs in the district court nor for costs at any subsequent state of the proceedings unless they accrue upon his appeal. If the plaintiff shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit." Interstate Commerce Act §§ 8, 9, 13 (1) and 16 (1) and (2), 49 U. S. C. §§ 8, 9, 13 (1) and 16 (1) and (2) (1964 ed.).

[2] "(9) Judicial relief from decisions, etc., upon denial or other disposition of application for rehearing, etc.

"When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual

Jurisdiction of both § 16 (2) and § 17 (9) suits is vested in the federal district courts by 28 U. S. C. § 1336 (a) (1964 ed.). Venue is determined by 28 U. S. C. § 1398 (a) (1964 ed.), which, "except as otherwise provided by law," limits suits to the judicial district where the party bringing the action has his residence or principal office. But because of the quoted exception, this venue restriction does not apply to suits commenced pursuant to § 16 (2), as that section contains its own venue provision.

Procedures for review of Commission orders "other than for the payment of money," see 28 U. S. C. § 2321 (1964 ed.), are governed by 28 U. S. C. §§ 2321–2325 (1964 ed.). Such actions must be brought by or against the United States, § 2322; the Commission and parties in interest appearing before the Commission may intervene as of right, § 2323; and no interlocutory or permanent injunction restraining enforcement of a Commission order may be granted unless the application is heard and

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commissioner, or a board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise." Interstate Commerce Act § 17 (a), 49 U. S. C. § 17 (9) (1964 ed.).

This provision was not added until 1940, Transportation Act of 1940, 54 Stat. 916, and is basically a provision requiring exhaustion of administrative remedies prior to resort to the courts. The first provision for direct judicial review of Commission orders appeared in § 5 of the Hepburn Act of 1906, 34 Stat. 592, which was phrased in terms of venue only. For ease of reference, we will refer to direct review proceedings as § 17 (9) proceedings.

determined by a three-judge district court, § 2325,[3] with direct review here, 28 U. S. C. § 1253 (1964 ed.). In *United States* v. *Interstate Commerce Comm'n*, 337 U. S. 426, however, this Court held that Commission orders which determine in a reparation proceeding that assailed rates are unlawful but do not direct the carrier to cease and desist charging such rates, because the rates have

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[3] The above-described provisions of the Judicial Code read in pertinent part:

"§ 1336. Interstate Commerce Commission's orders.

"(a) Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in any part, any order of the Interstate Commerce Commission.

. . . . . .

"§ 1398. Interstate Commerce Commission's orders.

"(a) Except as otherwise provided by law, any civil action to enforce, suspend or set aside in whole or in part an order of the Interstate Commerce Commission shall be brought only in the judicial district wherein is the residence or principal office of any of the parties bringing such action.

. . . . . .

"§ 2321. Procedure generally; process.

"The procedure in the district courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission other than for the payment of money or the collection of fines, penalties and forfeitures, shall be as provided in this chapter. . . .

"§ 2322. United States as party.

"All actions specified in section 2321 of this title shall be brought by or against the United States.

"§ 2323. Duties of Attorney General; intervenors.

"The Attorney General shall represent the Government in the actions specified in section 2321 of this title . . . in the district courts, and in the Supreme Court of the United States upon appeal from the district courts.

"The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own

been discontinued, "are not of sufficient public importance to justify the accelerated judicial review procedure," 337 U. S., at 442. Thus, though the procedures set out in 28 U. S. C. §§ 2321–2325 (1964 ed.) otherwise govern § 17 (9) proceedings to review such orders, § 2325 is not applicable and the matter may be adjudicated by a single judge. Because § 16 (2) actions seek enforcement of an order "for the payment of money," the above-described procedures do not apply. Section 16 (2) directs that actions thereunder "shall proceed in all respects like other civil suits for damages," with the exception of the special procedural advantages accorded the shipper to which we have previously referred.

II.

From the foregoing summary it will be observed that § 16 (2) actions for enforcement of Commission reparation awards and § 17 (9) actions to set aside Commission orders are quite distinct proceedings, with different venue restrictions and different procedures. Moreover, Congress conferred certain procedural advantages on shippers bringing § 16 (2) actions that may well be lost or impaired if carriers may attack the Commission's order in a direct review proceeding pursuant to § 17 (9). Ac-

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motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party.

. . . . .

"§ 2325. Injunctions; three-judge court required.

"An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title." 28 U. S. C. §§ 1336 (a), 1398 (a), 2321–2323, 2325 (1964 ed.).

cordingly, we are asked to harmonize the language and purposes of the two provisions.[4]

At the outset, however, it should be emphasized that we are here concerned with a narrow, though important, category of cases. First, it is conceded that if the Commission's reparation order is accompanied by a cease-and-desist order, as it usually will be when the proceeding originates before the Commission and the rates or practices under attack continue in use, the carrier may obtain immediate review of the cease-and-desist order pursuant to § 17 (9); and such review will ordinarily determine the validity of the finding of statutory violation on which the reparation order is founded. A Commission cease-and-desist order respecting rates and charges, for example, which may be issued pursuant to the authority granted by § 15 (1) to prescribe just and reasonable rates, subjects the carrier to $5,000 per day penalties for noncompliance, 49 U. S. C. § 16 (8) (1964 ed.), and is typical of orders reviewed in suits to set aside Commission orders since the first such suit, *Stickney* v. *Interstate Commerce Comm'n*, 164 F. 638 (D. C. D. Minn.), aff'd, 215 U. S. 98; see also *Interstate Commerce Comm'n* v. *Delaware, L. & W. R. Co.*, 220 U. S. 235; *United States* v. *Interstate Commerce Comm'n*, 337 U. S. 426, 454 (Frankfurter, J., dissenting). Second, even when a cease-and-desist order is not joined with the reparation order, the latter order will be subject to direct review when no other means of securing review is available, regardless of whether review is sought by a shipper, *United*

[4] As is readily apparent from this opinion, the statutory provisions governing this case and the companion case, *Consolo*, *post*, are an historical patchwork subject to more than one interpretation. The entire matter is surely ripe for congressional consideration, for it is of continuing significance and the competing considerations of yesterday may not be those of overriding importance today.

States v. *Interstate Commerce Comm'n*, 337 U. S. 426; *Consolo* v. *Federal Maritime Comm'n*, *post*, or the carrier, *Pennsylvania R. Co.* v. *United States*, 363 U. S. 202. In the cited cases the party seeking review could not obtain such review in a § 16 (2) suit, either directly or through interposition of a defense.

Thus in *United States* v. *Interstate Commerce Comm'n*, *supra*, the Government filed with the Commission a complaint seeking reparations, but the Commission found the assailed charges did not violate the Act and dismissed the complaint. As there was no award upon which to base a § 16 (2) suit, the United States would have been denied all review had jurisdiction of the § 17 (9) action not been sustained. Similarly, in *Consolo* v. *Federal Maritime Comm'n*, *post*, we hold that a shipper may challenge in a direct review proceeding the adequacy of a reparation award, such a challenge being one that could not be pressed in an enforcement action, see *Baltimore & Ohio R. Co. v. Brady*, 288 U. S. 448, 457–458; *D. L. Piazza Co.* v. *West Coast Line*, 210 F. 2d 947 (C. A. 2d Cir. 1954), cert. denied, 348 U. S. 893.

Pennsylvania R. Co. v. *United States*, *supra*, involved a suit by a carrier in the Court of Claims to collect the charges due under its tariff. The United States defended on the ground that the rates were unreasonable, and the Court of Claims referred that issue to the Commission pursuant to the primary jurisdiction doctrine, *United States* v. *Western Pac. R. Co.*, 352 U. S. 59, 62–70. The Commission found certain rates unjust and unreasonable, without ordering reparations or issuing a cease-and-desist order, and the carrier filed a § 17 (9) suit in federal district court to set the order aside. On review of the Court of Claims' refusal to further suspend its proceedings pending the District Court action, this Court held that the carrier was entitled to judicial review of the Commission order, that the Court of Claims

had no jurisdiction to afford such review, and that the Court of Claims should therefore have suspended its proceedings. Because of the holding that the Court of Claims could not review the Commission order, failure to sustain the District Court's jurisdiction of the carrier's § 17 (9) action would again have precluded judicial review.

The essential question in this case is the extent to which *United States* v. *Interstate Commerce Comm'n* and *Pennsylvania R. Co.* v. *United States,* compel allowance of respondents' direct review action. The Commission asks us to limit those cases to their facts—situations where judicial review would not have been available if the § 17 (9) suit was not permitted. It argues that sufficient opportunity to obtain review of the Commission's finding that a statutory violation has occurred is afforded respondents by their right to challenge that determination in defense of Thomson's § 16 (2) action to enforce the reparation award. If jurisdiction to review in a § 17 (9) suit should be sustained, the Commission further contends, shippers will be deprived of many of the advantages bestowed by § 16 (2). And the historical development of § 16 (2) and the direct review proceeding is said to establish that Congress did not contemplate that the carrier could obtain direct review in a case like that at bar and thereby short-circuit the shipper's suit. Finally, the Commission urges that in reparation cases where the assailed rates are no longer in effect and no cease-and-desist order issues the Commission's order has little continuing or general significance but is comparable to an adjudication in a private damages action of interest only to the parties involved; therefore, it is appropriate for the order to be defended by the shipper, who is in effect compensated for such defense by the procedural advantages accorded by § 16 (2), rather than by the United States and the Commission.

Respondents argue that, to the contrary, past practice and the decisions of this Court establish that the exclusive method of reviewing Commission findings that a statutory violation has occurred [5] is through a § 17 (9) proceeding and that such a finding may not be challenged and is not open to review in a § 16 (2) action. Respondents also argue that limiting review to the § 16 (2) proceeding would result in disparate treatment of shippers, through conflicting decisions in enforcement suits, and would thus violate the Act's cardinal principle of uniformity of rates.

As will appear more fully below, we take a middle course. We conclude that carriers may obtain full review by defending the § 16 (2) action and that the policy underlying that section precludes the carriers from obtaining review in a forum other than that chosen by the shipper. But we find no obstacle to the carriers' bringing a § 17 (9) cross-proceeding in the forum selected by the shipper, should they so desire.

III.

A threshold question is raised by respondents' contention that the statutory violation issue is not open to review in a § 16 (2) enforcement action, the Commission's finding being conclusive on the enforcement court unless set aside in a § 17 (9) proceeding. If respondents are correct on this point, their § 17 (9) action must be allowed under even the Commission's interpretation of *United States* v. *Interstate Commerce Comm'n*, 337

[5] Frequent Commission practice, illustrated by the procedure adopted in the present case, is to separate from the issue of shipper's damages issues respecting the existence of a statutory violation and the availability of statutory defenses such as the statute of limitations defense asserted by respondents and to try the latter issues first. The core of the dispute here concerns the forum for review of Commission findings on such issues of violation and limitations.

U. S. 426, and *Pennsylvania R. Co.* v. *United States*, 363 U. S. 202.

To support their view of the scope of review in the enforcement action, respondents refer principally to *Mitchell Coal & Coke Co.* v. *Pennsylvania R. Co.*, 230 U. S. 247. In that case, a shipper commenced his reparation suit under §§ 8 and 9 in a federal district court. This Court held that since the dispute raised "administrative" questions concerning the reasonableness of rates, the primary jurisdiction doctrine required the shipper to proceed first before the Commission. Regarding the weight to be accorded the Commission's resulting order, the Court said:

> "Such orders, so far as they are administrative are conclusive, whether they relate to past or present rates, and can be given general and uniform operation, since all shippers, who have been or may be affected by the rate, can take advantage of the ruling and avail themselves of the reparation order. They are quasi-judicial and only *prima facie* correct in so far as they determine the fact and amount of damage—as to which, since it involves the payment of money and taking of property, the carrier is by § 16 of the act given its day in court and the right to a judicial hearing . . . ." 230 U. S., at 258; accord, *Morrisdale Coal Co.* v. *Pennsylvania R. Co.*, 230 U. S. 304.

The prima facie evidence provision in § 16 (2), however, draws no express distinction between administrative and quasi-judicial findings of the Commission, and we said of that provision in *Meeker & Co.* v. *Lehigh Valley R. Co.*, 236 U. S. 412, 430, that "[i]t cuts off no defense [and] interposes no obstacle to a full contestation of all the issues . . . ." See also *United States* v. *Interstate Commerce Comm'n*, 337 U. S. 426, 435 (§ 16 (2)

proceedings afford "railroads complete judicial review of adverse reparation orders"). Moreover, in one of the earliest cases under the 1906 Act, the Court reviewed the question of statutory violation in a § 16 (2) case, concluded that the legal theory applied by the Commission was erroneous, and set aside the Commission's determination that the disputed rates were unreasonable. Southern *R. Co.* v. *St. Louis Hay & Grain Co.*, 214 U. S. 297. See also *Arizona Grocery Co.* v. *Atchison, T. & S. F. R. Co.*, 284 U. S. 370. The seemingly contradictory statements in the contemporaneous *Mitchell Coal* and *Meeker* decisions require explanation, which we believe can be found in the general course of decisions in that era respecting the scope of review of Commission orders.

From our brief résumé of the Court's opinion in *Mitchell Coal* it should be immediately apparent that the case did not, strictly speaking, require the determination of the scope of judicial review in § 16 (2) enforcement actions. The proceeding under review had been commenced in court pursuant to § 9 rather than § 16 and no Commission order had yet been entered. The question directly in issue concerned the applicability of the primary jurisdiction doctrine to cases involving discontinued, rather than present, rates.

Initially formulated in cases arising under the Interstate Commerce Act, the primary jurisdiction doctrine was premised in the early cases on the policy of the Act of assuring uniform rates. The Court reasoned that many questions arising under the Act, such as whether rates were unreasonable or discriminatory, were essentially questions of fact particularly appropriate for determination by an expert Commission. If shippers could challenge the filed rates by proceedings before a court, without prior resort to the Commission, different conclusions might be reached by different courts; and the prevailing shippers would thereby obtain a rate preference

as compared to unsuccessful shippers, which would violate the principle of uniform rates. See, *e. g., Texas & Pac. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 440–441; *Baltimore & Ohio R. Co.* v. *Pitcairn Coal Co.*, 215 U. S. 481, 493–495; *Mitchell Coal & Coke Co.* v. *Pennsylvania R. Co.*, 230 U. S. 247, 255–260. Of course a preliminary determination by the Commission would have little effect in achieving uniformity if its determination were subject to *de novo* review, and it was for that reason that the Court pointed out in *Mitchell Coal* the "conclusive" effect that would be accorded "administrative" findings of the Commission in any ensuing § 16 action.

But other decisions rendered by the Court during the same period indicate that it was not only in § 16 proceedings that the Commission findings would be conclusive, in the sense the Court was actually using that term. Under the original Act, failure to comply with any order of the Commission did not in itself entail any penalty. Commission orders were judicially enforceable at the instance of the Commission or any party in interest, and the Act provided that in an enforcement action "the findings of fact in the report of said Commission shall be prima facie evidence of the matters therein stated." Interstate Commerce Act, § 16, 24 Stat. 384 (1887), as amended, 25 Stat. 860 (1889). Though retaining the prima facie evidence provision for actions on reparation awards, the Hepburn Act of 1906 included no provision respecting the weight to be given Commission findings in nonreparation cases. Section 15 of the amended Act, however, made Commission orders, except orders for the payment of money, self-enforcing for purposes of incurring liability for penalties for noncompliance, unless such orders had been suspended or set aside by a court of competent jurisdiction. In *Interstate Commerce Comm'n* v. *Illinois Central R. Co.*, 215 U. S. 452, a

suit to set aside a cease-and-desist order, the changes effected by the 1906 Act in making Commission orders self-enforcing were interpreted as reducing the scope of judicial review from that prevailing when Commission orders were only prima facie evidence. The Court stated it could consider whether the Commission action exceeded constitutional power or right, whether the administrative order was within the scope of authority delegated, and whether the exercise of authority was reasonable, but it could not "usurp merely administrative functions by setting aside a lawful administrative order upon our conception as to whether the administrative power has been wisely exercised. Power to make the order and not the mere expediency or wisdom of having made it, is the question." 215 U. S., at 470. Through frequent repetition, see *Interstate Commerce Comm'n* v. *Union Pac. R. Co.*, 222 U. S. 541, 547–548; *Procter & Gamble Co.* v. *United States*, 225 U. S. 282, 297–298, the principles elaborated in *Illinois Central* gradually became restated as a doctrine "that the findings of the Commission were made not merely *prima facie* but conclusively correct in case of judicial review, except to the extent pointed out in the *Illinois Central* and other cases . . . ," *United States* v. *Louisville & Nashville R. Co.*, 235 U. S. 314, 320. Accord, *Central R. Co.* v. *United States*, 257 U. S. 247, 256–257; *United States* v. *Illinois Central R. Co.*, 263 U. S. 515, 525–526 and n. 7. See generally, *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, 139–140. By a parallel development, the Court placed increasing reliance in primary jurisdiction cases on the "conclusive" effect of Commission orders as a factor demonstrating that the requirement of preliminary resort to the Commission on administrative questions would indeed further the statutory policy of uniform treatment. Compare *Baltimore & Ohio R. Co.* v. *Pitcairn Coal Co.*, 215 U. S. 481, 494, with *Mitchell Coal & Coke Co.* v.

Pennsylvania R. Co., 230 U. S. 247, 258, quoted, *supra*, p. 14.

When *Mitchell Coal* and *Meeker* are read together against the background of the *Illinois Central* and *Louisville & Nashville* cases it becomes clear that Commission orders are fully reviewable in § 16 (2) suits, but Commission findings on questions required under the primary jurisdiction doctrine to be determined first by the Commission are conclusive in the same sense that such findings would be conclusive in suits to set aside the Commission's order. That is, findings on primary jurisdiction issues are to be reviewed by the Court on the administrative record under the familiar standards elaborated in direct review proceedings, while findings on other questions are subject to review under the prima facie evidence provision of § 16 (2), with the statutory rights of introducing evidence not before the Commission and obtaining a jury determination of disputed issues of fact.[6] Such an interpretation of § 16 (2)'s prima facie evidence provision is required if that provision is to be consonant with the primary jurisdiction doctrine. That interpretation seems to have been applied by the Court in *Pennsylvania R. Co.* v. *Weber*, 257 U. S. 85, 90–91; *Louisville & Nashville R. Co.* v. *Sloss-Sheffield Co.*, 269 U. S. 217; *News Syndicate Co.* v. *New York Central R. Co.*, 275 U. S. 179; *Adams* v. *Mills*, 286 U. S.

[6] Section 16 (a), of course, does not limit the carrier to introducing opposing evidence to rebut the prima facie effect of the Commission's order. It may also challenge the admissibility of the order on the grounds, for example, that the Commission did not afford the carrier a fair hearing or that the order was not based upon substantial evidence, *Spiller* v. *Atchison, T. & S. F. R. Co.*, 253 U. S. 117, 126. But if a Commission order containing findings on all matters essential to the shipper's recovery is admitted and the carrier produces no opposing evidence, the findings and order of the Commission may not be rejected by the jury and the shipper is entitled to judgment. *Meeker* v. *Lehigh Valley R. Co.*, 236 U. S. 434, 439; see *Pennsylvania R. Co.* v. *Jacoby & Co.*, 242 U. S. 89, 94 (dictum).

397, 409–410.[7] It is urged in the present case by the Commission and in a companion case by the Federal Maritime Commission, was accepted by the court below, 334 F. 2d, at 49, n. 12, and has been applied by several other lower federal courts, *New Process Gear Corp.* v. *New York Central R. Co.*, 250 F. 2d 569, 571–572 (C. A. 2d Cir. 1957), cert. denied, 356 U. S. 959; *Midland Valley R. Co.* v. *Excelsior Coal Co.*, 86 F. 2d 177, 181–182 (C. A. 8th Cir. 1936); *Baltimore & O. R. Co.* v. *Brady*, 61 F. 2d 242, 246, 248 (C. A. 4th Cir. 1932), rev'd on other grounds, 288 U. S. 448; *City of Danville* v. *Chesapeake & O. R. Co.*, 34 F. Supp. 620, 625, 627–628 (D. C. W. D. Va. 1940); *Hillsdale Coal & Coke Co.* v. *Pennsylvania R. Co.*, 237 F. 272, 275 (D. C. E. D. Pa. 1916). We adhere to that interpretation now.

IV.

Having established that the carrier has ample opportunity to secure review in the enforcement action, we must now consider whether affording the carrier the alternative of bringing direct review proceedings pursuant to § 17 (9) would vitiate the congressional policy expressed in § 16 (2) of encouraging prompt payment of reparation awards. To effectuate that policy, Congress has provided for the shipper certain procedural and substantive benefits pertaining to venue, freedom from costs, prima facie effect of the Commission's order, and allowance of a reasonable attorney's fee. The Commission contends that permitting the carrier to bring direct review proceedings will materially impair the benefits

[7] In *Louisville & Nashville R. Co.* v. *Sloss-Sheffield Co.*, 269 U. S. 217, the Court considered a carrier's statute of limitations defense on review of a judgment for the shipper in a § 16 (2) enforcement action. Accord, *Meeker & Co.* v. *Lehigh Valley R. Co.*, 236 U. S. 412. Thus, it would seem beyond question that respondents here could have presented in Thomson's New York action the defense on which they prevailed in the courts below.

derived by the shipper from the procedural dispensations of § 16 (2). We conclude that although the degree of impairment would be less than that claimed by the Commission, it would nevertheless be substantial.

The Commission argument respecting venue, which we accept, proceeds as follows: Because the carrier may bring its § 17 (9) action as soon as the final Commission order is entered but the shipper's § 16 (2) suit must await passage of the date set for compliance, the carrier may file its suit first and thus obtain priority. Although the carrier's suit must be brought against the United States, 28 U. S. C. § 2322 (1964 ed.), the Commission and the shipper may intervene as of right, 28 U. S. C. § 2323 (1964 ed.), and the shipper will be under compulsion to do so to protect its interest since a decision setting aside the Commission's order would destroy the foundation of the enforcement action. In this way, the shipper will frequently be denied his choice of forum on the statutory violation issue as the § 17 (9) suit must be brought in the judicial district of the residence or principal office of the party bringing the suit, 28 U. S. C. § 1398 (a), which may be far removed from the districts in which the shipper resides or through which the road of the carrier runs—alternatives that are open to the shipper under § 16 (2) and, being likely to offer a more convenient venue to the shipper, would frequently be the shipper's choice.

By a similar analysis the Commission also contends that a shipper forced to intervene in the carrier's § 17 (9) action would lose the advantages of freedom from costs and the right to a reasonable attorney's fee, since those rights are conferred only in the § 16 (2) action and not in § 17 (9) actions. But since both the § 16 (2) action and the § 17 (9) action may be heard and determined by a single district judge when the reparation order is not accompanied by a cease-and-desist order, *United States* v.

Interstate Commerce Comm'n, 337 U. S. 426, 440–443; *Pennsylvania R. Co.* v. *United States*, 363 U. S. 202, it would be possible, apart from venue problems,[8] for the shipper to press his action in the same district as the carrier's action, either by an independent action to be consolidated with the carrier's action, Fed. Rules Civ. Proc. 42 (a), or by a counterclaim after intervention in the carrier's action, see *Switzer Brothers, Inc.* v. *Locklin*, 207 F. 2d 483 (C. A. 7th Cir. 1953); Moore, Federal Practice ¶¶ 13.05, 24.17 (2d ed. 1964). Then to the extent that the shipper's costs and attorney's fees were attributable to its § 16 (2) counterclaim or action the § 16 (2) advantages would clearly be applicable. And it would be arguable—an issue we do not decide—that the shipper

[8] Venue of suits to set aside the Commission's order is limited by 28 U. S. C. § 1398 (1964 ed.) to the district in which the party bringing the action has its residence or principal office. Section 16 (2) provides for venue in the district where the shipper resides "or in which is located the principal operating office of the carrier, or through which the road of the carrier runs . . . ." As § 16 (2) does not expressly provide for venue in the district in which the carrier resides and that district may not coincide with one of the districts that are listed, it would appear that in some cases in which the carrier elects to file its § 17 (9) action in the district of its residence, rather than the district of its principal office, the district chosen by the carrier will not be one where the shipper could originally have brought suit. It was primarily similar venue problems that prompted enactment in 1964 of 28 U. S. C. § 1336 (b), which provides that exclusive jurisdiction of a § 17 (9) action to set aside a Commission order arising out of a primary jurisdiction reference to the Commission shall be vested in the referring court. 1964–2 U. S. Code Cong. and Admin. News 3235–3239. When the § 17 (9) action is filed first, however, venue difficulties are less likely to occur as the § 16 (2) venue provisions are in general broader than those applicable to § 17 (9) actions. In any event, venue objections may perhaps be overcome by transfer of the § 17 (9) action, 28 U. S. C. § 1404 (1964 ed.), or by application of the doctrine of waiver, see 3 Moore, Federal Practice, ¶ 13.16, at p. 45 (1964 ed.) (venue of counterclaims by interveners).

would be entitled to the benefit of § 16 (2) as to all its costs and attorney's fees in the combined action.

Since the Commission believes that the scope of review of findings on primary jurisdiction issues would be the same regardless of whether review was sought in a § 16 (2) or a § 17 (9) action, it makes no claim that allowance of the direct review proceeding would undercut the prima facie evidence provision of § 16 (2).

In summary, the principal, if not sole, effect of permitting respondents' direct review proceeding would be to force on shippers the alternatives of either foregoing the opportunity to defend the Commission order or accepting the carrier's choice of a distant venue. The first alternative is obviously counter to the policy expressed in § 16 (2), and, as we have said, it is to be expected that shippers would elect to defend the Commission's order even at the expense of loss of their venue advantage. The importance of choice of venue in these actions should not be discounted. Since the record in the enforcement action is not limited to that made before the Commission, the shipper may desire to call witnesses or to introduce documentary evidence either in direct support of the Commission's order or in rebuttal to opposing evidence produced by the carrier, thus bringing into play those factors relating to the convenience of witnesses and the relative burden of making proof that make the choice of venue so important in other contexts. See *Mercantile National Bank* v. *Langdeau*, 371 U. S. 555; *Schnell* v. *Peter Eckrich & Sons, Inc.*, 365 U. S. 260.

V.

But respondents contend that confining review to the enforcement action would introduce into the administration of the Act problems of greater severity and importance than any effect such a course might have in safe-

guarding the shipper's § 16 (2) privileges. Respondents note that under the doctrine of *Phillips Co.* v. *Grand Trunk Western R. Co.*, 236 U. S. 662, shippers who were not complainants before the Commission may nevertheless obtain the advantage of the Commission's reparation order as a basis for their own § 16 (2) action. It is argued that the enforcement court has no power to set aside the Commission order and, therefore, a decision upholding a carrier's attack on the Commission's order in one enforcement proceeding would not preclude another shipper from successfully invoking that order in a separate enforcement proceeding, thus resulting in disparate treatment of shippers contrary to the Act's objective of securing uniform rates.

It is of course true that the court may not formally set aside the Commission's order in an action in which neither the Commission nor the United States is a party. Cf. *United States* v. *Jones*, 336 U. S. 641, 651–653, 670–671; *Pennsylvania R. Co.* v. *United States*, 363 U. S. 202, 205. But we do not read *Phillips Co.* v. *Grand Trunk Western R. Co., supra,* to permit reliance by a nonparticipating shipper on the Commission's order when it has been disapproved in litigation between the complainant shipper and the railroad. In the *Phillips* case, the Commission had separately determined that challenged rates were unlawful and had issued a cease-and-desist order, which was sustained in an enforcement proceeding brought by the Commission. *Illinois Central R. Co.* v. *Interstate Commerce Comm'n*, 206 U. S. 441. Thereafter, some reparation claims were settled, and Phillips, which had not been a complainant before the Commission, commenced its reparation action. The Court reasoned that if Phillips could not rely on the Commission order, shippers prevailing before the Com-

mission would obtain a preference as compared to nonparticipating shippers. Therefore, the Court ruled that if:

> "there was a finding of unreasonableness in the proceedings begun by others, [the nonparticipating shipper] could, if in time, present his claim, and await the result of the litigation over the validity of any order made at the instance of those parties. If it was ultimately sustained by the court as valid he would then be in position to obtain reparation from the Commission—or a judgment from a court of competent jurisdiction, on a claim that had been seasonably presented." 236 U. S., at 666.

The *Phillips* case thus contemplates that the suit of a nonparticipating shipper is to await the outcome of litigation over the validity of the Commission order and that the nonparticipating shipper may rely on the Commission's order only when the policy of uniformity will thereby be served.

It might still be argued that disparity in treatment of shippers would result in cases involving multiple complainants before the Commission. The several shippers could commence separate enforcement actions in different courts, and those courts might disagree concerning the validity of the Commission's order. But such conflicts could be completely avoided only by limiting review on the question of statutory violation to a single suit by a carrier to set aside the Commission's order, and the long and unvarying course of decisions permitting review in the enforcement court precludes our limiting review to § 17 (9) proceedings. *Southern R. Co.* v. *St. Louis Hay & Grain Co.*, 214 U. S. 297; *Arizona Grocery Co.* v. *Atchison, T. & S. F. R. Co.*, 284 U. S. 370; *Adams* v. *Mills*, 286 U. S. 397; *Brown Lumber Co.* v. *Louisville & N. R. Co.*, 299 U. S. 393; *Porter Co.* v. *Central Vermont R.*

Co., 366 U. S. 272, 274, n. 6 (dictum). In any event, we do not believe that in practice such conflicts will frequently occur. If the first enforcement court to issue its decision sustains the Commission order, that decision will generally be accepted as persuasive authority by other courts. Such conflicts as do occur will be similar to those that may arise when, in a suit commenced in court under § 9, the primary jurisdiction doctrine is not applicable and the court is free to decide questions under the Act as an original matter; and such conflicts may ultimately be resolved here. If the first court to reach decision strikes down the Commission order, it may do so on grounds permitting reconsideration of the matter by the Commission. When the primary jurisdiction doctrine requires initial decision by the Commission, it also precludes the court from redetermining the question itself should the Commission decision be defective. The proper course is to remand to the Commission, *Southern R. Co.* v. *St. Louis Hay & Grain Co.*, 214 U. S. 297, 302; *Louisville & Nashville R. Co.* v. *Behlmer*, 175 U. S. 648; compare *United States* v. *Jones*, 336 U. S. 641, 651–653, 670–671, with *United States* v. *Bianchi & Co.*, 373 U. S. 709, 718, which has continuing power to suspend or to modify its orders, Interstate Commerce Act § 16 (6), 49 U. S. C. § 16 (6) (1964 ed.). The carrier will naturally request the Commission to reopen the prior order as to all shippers. See *Baldwin* v. *Milling Co.*, 307 U. S. 478; but cf. *Gulf, M. & N. R. Co.* v. *Merchants' Specialty Co.*, 50 F. 2d 21 (C. A. 5th Cir. 1931). In some cases, however, a decision refusing to enforce the Commission's order will finally determine its validity as between the parties to that action without any necessity for a remand to the Commission. Here too the first adjudication will generally be persuasive and, if not, conflicting decisions may be reviewed in this Court. Finally, under the interpretation of §§ 16 (2) and 17 (9) that we elaborate below

the carrier may bring a direct review proceeding as a cross-action in the forum selected by a shipper, thus ensuring that the court will have power to affect the order itself and thereby maintain uniformity as between shippers.

VI.

Recent decisions of this Court have recognized that Commission orders determining a "right or obligation" so that "legal consequences" will flow therefrom are judicially reviewable. *Pennsylvania R. Co.* v. *United States,* 363 U. S. 202, 205; *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 131, 132, 143. Such review "is equally available whether a Commission order relates to past or future rates, or whether its proceeding follows referral by a court or originates with the Commission." *Pennsylvania R. Co.* v. *United States, supra,* at 205. Under these established principles the order attacked in this case is unquestionably subject to review, and in *Pennsylvania R. Co.* v. *United States, supra,* and *United States* v. *Interstate Commerce Comm'n,* 337 U. S. 426, similar orders were held reviewable in direct proceedings.

The question before us now, however, is not whether review is to be afforded but where that review is to occur. In the three preceding sections of this opinion we have established three conclusions that must serve as guideposts for our decision of that question. First, respondents have ample opportunity to secure review of the Commission's order through defense of the shipper's enforcement action. By contrast, the *Pennsylvania R. Co.* and *Interstate Commerce Comm'n* cases dealt with situations where the order in dispute could only be reviewed in § 17 (9) proceedings, and those cases thus do not control decision here. Second, allowing respondents the alternative of bringing direct review proceedings would substantially impair shippers' § 16 (2) right to select a convenient venue. Third, contrary to respond-

ents' contention, limiting review to the enforcement action would not be likely to result in disparity in treatment of shippers. If, therefore, review can be limited to the enforcement forum selected by the shipper consistent with the language and history of the provisions establishing the direct review proceeding, we should adopt that course.

During the first 19 years of the Commission's existence its orders were not reviewable through direct proceedings. Until 1906, noncompliance with a Commission order did not expose a carrier to immediate sanctions; an order was enforceable only after judicial proceedings in which the carrier could challenge its validity. The 1906 Act imposed penalties of $5,000 a day for violation of Commission orders and "[t]he statutory jurisdiction to enjoin and set aside an order was granted in 1906, because then, for the first time, the rate-making power was conferred upon the Commission, and then disobedience of its orders was first made punishable," *United States* v. *Los Angeles R. Co.*, 273 U. S. 299, 309; see also 40 Cong. Rec. 5133 (remarks of Senator Foraker). Thus the genesis of the direct review proceeding was the desire to afford an injunctive remedy for persons faced with the threat of irreparable injury through exposure to liability for mounting penalties without any other opportunity for judicial review until the Commission or some interested party should choose to commence enforcement proceedings. Compare *Ex parte Young*, 209 U. S. 123, 147–148. The essentially equitable nature of the direct review proceeding was remarked in early cases denying review of "negative orders" that did not command any action by the carrier and therefore did not threaten the carrier with any sanctions. Compare *United States* v. *Los Angeles R. Co.*, 273 U. S. 284, with *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125. Similarly, as the per diem penalties do not apply to noncompliance with orders for the payment of money, two

of the three courts to have considered the issue presented in the case at bar denied carriers direct review on the ground that no equitable cause of action had been stated. *Pittsburgh & W. V. R. Co.* v. *United States,* 6 F. 2d 646, 648–649 (D. C. W. D. Pa. 1924); *Baltimore & O. R. Co.* v. *United States,* 12 F. Supp. 261, 263 (D. C. D. Del. 1935), appeal dismissed, 87 F. 2d 605 (C. A. 3d Cir. 1937); contra, *Southern R. Co. v. United States,* 193 F. 644 (Commerce Ct. 1911). And decisions sustaining direct review of reparation orders have stressed the absence of alternative means for obtaining review—in equity terms, inadequacy of remedies at law. See, *supra,* at pp. 11–12.

As the principles stated at the beginning of this section demonstrate, the test of reviewability is no longer pregnant with the concept of irreparable injury to the same extent as when the negative order doctrine held sway, and we do not mean to resurrect the strict equity approach. This history nevertheless establishes that the core concern of Congress in creating the direct review proceeding was with orders that were "self-enforcing" in the sense of exposing recalcitrant carriers to substantial monetary penalties. The legislative history permits absolutely no inference that Congress intended to undercut the shipper's remedies in the enforcement action. To the contrary, the 1906 Act simplified those enforcement procedures so as to provide additional assistance to shippers. H. R. Rep. No. 591, 59th Cong., 1st Sess., p. 5; 40 Cong. Rec. 2256 (remarks of Congressman Hepburn). Moreover, the equitable nature of the direct review proceedings certainly affords ample basis for requiring the direct review court to defer its proceedings pending the outcome of the enforcement action, a course that is consistent with the legislative history of the direct review proceeding and will maximize the remedial purposes of § 16 (2).

Lest there be any misunderstanding, we emphasize that our reasons for finding the direct review proceeding unavailable in a case such as this where the carriers began that proceeding in a forum other than that selected by the shipper for its enforcement action are inapplicable when the direct review proceeding is brought as a cross-action in the enforcement court.[9] Obviously allowance of the cross-action will not impair the shipper's venue right. And we think that the § 16 (2) provisions respecting court costs and attorney's fees unquestionably would be applicable to the whole of the combined action in such a case. The Commission argues, nevertheless, that reparation orders respecting past rates are not of sufficient general importance to require their defense by the United States and the Commission, and that the direct review proceeding should not be permitted regardless of the court in which it is brought. That apparently is not the view of Congress, however, for when it provided in 1964 that review of Commission orders entered on reference of primary jurisdiction issues should be had only in the court making the reference, 28 U. S. C. §§ 1336 (b) and 1398 (b) (1964 ed.), it did so by placing jurisdiction and venue of the direct review proceeding in that court, see generally S. Rep. No. 1394, 88th Cong., 2d Sess. (1964), in 1964–2 U. S. Code Cong. and Admin. News 3235, rather than by providing for review as an

[9] "Except as otherwise provided by law," 28 U. S. C. § 1398 (a) (1964 ed.), quoted, *supra*, n. 3, limits venue of direct review proceedings to the judicial district of the residence or principal place of business of the party bringing the action. Since we interpret § 16 (2) as precluding a carrier from bringing an enforcement action in any court but the enforcement court, that section provides venue for the carrier's cross-action under the "except as otherwise provided by law" provision of § 1398 (a). In the rare cases when the enforcement action is brought in state, rather than federal, court it will of course not be possible for the carrier to bring a § 17 (9) cross-action.

incident of the original action. See also Brief for the United States in *Pennsylvania R. Co.* v. *United States* (No. 451 O. T. 1959) 7–9, 21–22. As we indicated in the preceding section, in some cases there will be some advantage for purposes of assuring the uniform application of the Act in the court's having jurisdiction to directly affect the Commission's order, and we see no justifiable reason for preventing the carrier from bringing the United States into the enforcement court should it so desire.

The proceeding before us, however, was not brought in the enforcement court. Indeed, proceedings in the latter court have been deferred pending the outcome of this case. For the reasons stated herein, the District Court erred in entertaining respondents' action and the judgment of the Court of Appeals sustaining the District Court must be

Reversed.

MR. JUSTICE DOUGLAS concurs in the result.

MR. JUSTICE BLACK took no part in the consideration or decision of this case.